
STANDING COMMITTEE ON THE OMBUDSMAN

ORGANIZATION

WEDNESDAY, 10 MAY 1989

STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Bossy, Maurice L. (Chatham-Kent L)
Bryden, Marion (Beaches-Woodbine NDP)
Carrothers, Douglas A. (Oakville South L)
Cousens, W. Donald (Markham PC)
Henderson, D. James (Etobicoke-Humber L)
LeBourdais, Linda (Etobicoke West L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Clerk: Carrozza, Franco

LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON THE OMBUDSMAN

Wednesday, 10 May 1989

The committee met at 1008 in room 151.

ORGANIZATION

Clerk of the Committee: Good morning, ladies and gentlemen. It is my duty to ask you to elect a new chairman. Could I please have nominations?

Mr Philip: I move that Cindy Nicholas be elected chairman of the standing committee on the Ombudsman.

Clerk of the Committee: Any other nominations? There being no other nominations, I call upon Miss Nicholas to take the chair.

Mr Philip: But do not expect it to be that easy in two years.

The Chairman: I hope I am here in two years.

Can we have nominations for the vice-chairman of the Ombudsman committee?

Mr Carrothers: I nominate Maurice Bossy as vice-chairman.

The Chairman: Any other nominations? Seeing none, Mr Bossy, I hope you will assume the role of vice-chairman when the chairman is unable to attend.

I am sorry I was not quite ready. I had forgotten that we were newly constituted. Welcome back. This is the standing committee on the Ombudsman. Today we are meeting just for organizational purposes. I am happy to see we have more or less the same group of people who have worked so well together and look forward to doing that again.

We have a motion for our subcommittee. All of you have that in front of you; it is underneath your agenda. When we receive communications from the public, the subcommittee permits us an opportunity to meet with a smaller group of people and to entertain any complaints or any inquiries we have from the public. One member from each party and the chairman are the people on the committee. Could we have from each party the individual who will be serving on that? Do we have to elect?

Clerk of the Committee: Yes.

The Chairman: Oh, my goodness.

Clerk of the Committee: Then if they wish to substitute on to that, that is quite all right.

The Chairman: Okay. We have to have a motion to establish the new subcommittee on communications from the public.

Mr Carrothers moves that a subcommittee be struck to consider on the committee's behalf communications from the public; the subcommittee to be

composed of one member from each party and the chairman of the committee, namely, Cindy Nicholas (chairman), Linda LeBourdais, Ed Philip, Jim Pollock, with a quorum of four; substitution shall be permitted on written notice. All communications from the public to the committee shall be referred to the subcommittee, which shall review and respond to them, provided that all decisions by the subcommittee shall be unanimous; any matters which are not decided unanimously by the subcommittee shall be considered by the full committee. The subcommittee shall report to the committee, for consideration by it, any matters which in the subcommittee's opinion warrant the full committee's attention. The subcommittee shall, subject to direction by the committee, determine its procedures.

Motion agreed to.

The Chairman: Hopefully, after the meeting the subcommittee can discuss when it can meet next. We have a number of communications from the public to deal with and I think we should meet as soon as possible.

Next on the agenda is the budget, which is attached. I thought we could put this forward for consideration today, and if there are no amendments, we can take this to the Board of Internal Economy. However, if there are amendments, it provides us an opportunity when we next meet, on 24 May, to discuss it again. We are not meeting next week. Next week is the budget, and there has been agreement not to have committee on that day. I think there has been agreement; has there, Mr Philip?

Mr Philip: I think so, yes. We would not meet on budget day.

The Chairman: I assume there has been. If we can perhaps go through the budget, anyone can just jump in with any concerns or questions he has at any time.

We have allowed for four weeks of meeting throughout the year: two weeks to review the annual report and two weeks in case there are any special reports or any other cases that come before the committee. We have allowed an appropriate amount for that.

The other is there is an ombudsmen's conference at the end of October. It is when the House is sitting. I would like to discuss that. I, in my role now as chairman, have been invited to attend that, and I assume whoever is the chairman at the end of October will assume that role. It is in Quebec City. It has been normal that if we are sitting, the whole committee is not permitted to travel, so we have put in for the chairman, the clerk, the research officer and the subcommittee. Is that acceptable to the committee as a whole?

Mr Pollock: That is not necessarily the subcommittee that has been already elected.

The Chairman: No. That is a subcommittee on communications from the public, and I think the parties are at liberty to decide who they send.

Mr Philip: But it is important that the chairman, the researcher and the clerk attend. I always have some concern on committees like this when we only send part of a committee to something as important as this. It is unfortunate that there is no way in which the House leaders will approve 11 people leaving the House. I want to voice that concern and leave it at that. I do not intend to force a recorded vote or something like that. We try to work by consensus here.

The Chairman: Right.

Mr Carrothers: Can we make provision for the whole committee to go and —

The Chairman: And see what they say?

Mr Carrothers: —deal with it at the time? Then we have the budget to have the whole committee go. If at the time the whole committee does not, then that is fine. Would that be a better way to approach it at this point?

The Chairman: The clerk has something before you, Mr Bossy.

Mr Bossy: Yes. I would strongly recommend and go along with what Doug has recommended, that we make a strong appeal in view of the fact that it is a Canadian conference. Also, it may be good that we inquire to see how other jurisdictions are handling it within Canada, so that we know. I do not particularly go for the whole committee going on a worldwide tour, but it is in Canada, it is an important conference and I think we should go as a committee. A strong appeal should be made to the Board of Internal Economy that it approve more money so the whole committee can go.

The Chairman: Actually, we had inquired and the clerk can respond.

Clerk of the Committee: I spoke the assistant to the Ombudsman in Quebec. She told me that there are only three committees in Canada. They were concerned that there would be too many people attending the committee, so they are going to ask to keep it to a minimum. That is the reason why the chairman has suggested that we have the subcommittee.

Mr Bossy: It is a very small conference?

Clerk of the Committee: Yes, it is.

The Chairman: I think there are about 100 attendees.

Clerk of the Committee: Yes, and that includes their spouses.

The Chairman: I think we are still at liberty to suggest the whole committee as a policy matter, as Mr Philip has suggested, or we can go with the subcommittee. There has been a definite extension of an invitation to the chairman and to a subcommittee. I did raise with Francine when she called initially the whole committee attending.

Mr Philip: I have not suggested that the whole committee attend, because I think it is unreasonable for you to go and ask for something they are going to simply turn down. It makes us look foolish, as though we do not know that they have some pretty hard rules about committees travelling when the House is in session. I think it hurts your credibility when you appear before the Board of Internal Economy, if you go and ask for something it is going to stop at.

I am not suggesting that; I am saying it bothers me to have just a few members go to something like this. I am usually fortunate enough to be one of the few members who goes to these things. I am not being self-serving in saying that. I just want it on the record, and I would move the approval of the budget as is.

The Chairman: We have two other suggestions on the table.

Mr Philip: I would simply say that what I was trying to put on the record was the principle. I am not suggesting that you move a budget for the whole committee while the House is in session, because I do not think it will be approved and I think it hurts your credibility before the Board of Internal Economy.

I want the principle on the record that wherever possible we should avoid sending subcommittees to conferences; they come back, they have had certain experiences that the other members have not. No matter what kind of written report you have, a lot of the benefits of these conferences are what you pick up in the lobbies over coffee, talking to an Ombudsman from another country or something like that.

1020

Mr Carrothers: I guess I made the suggestion about including the funds for all members, not realizing that the convention itself had only invited the subcommittee. I think perhaps we should respect the convention's wishes and go along with the smaller number in this instance. Although I agree with the general comments Mr Philip has made, that the whole committee should be travelling, in this case they do not appear to want it, so I am not sure we should impose on them in that fashion.

The Chairman: I do not think it is wanting; I think it is that they have accommodated their conference for a more intimate group. Mr Bossy, since you are the only other person to--

Mr Bossy: I do not have much choice really, because I did not have that information as well. In view of the fact that the information came later, I will have to rescind my statement.

The Chairman: Before we move adoption of the budget, can we go over a couple of more things on specific items?

The other one I wanted to bring up is again the legal fees. Mr Bell serves as our counsel, as I think all members are aware, and last year we put him in at a $100 per hour amount, which was a raise--it was accepted by the board--for 200 hours. This year once again the legal fees have exceeded the amount we allocated, by approximately $1,900, so it was not too far off the mark.

I would like to open once again for consideration that we consider the role of the legal counsel and his participation in weekly meetings as opposed to what was initially considered, that he would deal with just the special cases when they came forward, help the committee with the bundles of information we get and perhaps give us some legal direction.

Two hundred hours has been put in there. I wonder if we can keep it to 200 hours or less by defining the role of our counsel. A lot of this time is spent preparing, but he does come to a lot of our weekly meetings. Also, it is spent meeting with the Office of the Ombudsman prior to a case coming forward, and sometimes he is asked to meet with people to discuss the role of the standing committee on the Ombudsman.

I would like to hear any comments people have, because I do always have trouble with this one when I go before the board.

Mr Pollock: Was he allowed 200 hours last year?

The Chairman: That is correct.

Mr Pollock: And he ran over that?

The Chairman: He ran over.

Mr Pollock: I guess I have some problem with that in one way. After all, if you set a budget how come you deliberately run over it? We have to stay within our budgets.

The Chairman: I guess the last case that came in, the Ministry of Agriculture and Food, was a special report. However, we had anticipated needing that extra week in our original amount, so that sort of was an unidentified factor. We are guessing now. We have not seen the Ombudsman's report, so we are sort of guessing on past experience how many weeks we will need.

Mr Pollock: The last case was a highly technical case.

Mr Carrothers: I wonder if I could just expand on the other roles that counsel has been taking on and get the terms of his retainer. Obviously, I guess, in terms of these recommendation-denied cases, you are not going to quite know and there has got to be some flexibility when he is working on those. We cannot always predict it. You say he is attending weekly meetings. Were those the subcommittee meetings?

The Chairman: No. He attends our weekly meetings here.

Mr Carrothers: Even though we are not dealing with cases?

The Chairman: In many instances; or we may be dealing with the Ombudsman's estimates or statistics, or some of it may be organization. Then he takes it upon himself to meet with the Ombudsman's office prior to recommendation-denied cases coming before our committee.

Mr Carrothers: You said something about meeting with members. Does he meet with individual members of the committee?

The Chairman: No, I do not believe he meets with individual members unless he is meeting with the subcommittee. In one particular instance he was needed for advice on the subcommittee, but he has met with a gentleman, Bev Macaulay, who has been doing a report on Ontario International Corp appointments and different commissions and boards and their effectiveness.

He was looking at the Ombudsman, and he undertook to meet with him for about three hours, without the committee's direction, to discuss with Mr Macaulay what our role is and how it relates to the Ombudsman's office. He would do a number of things along those lines.

Mr Carrothers: Do we have a retaining agreement?

The Chairman: Yes, we do have a retaining agreement.

Clerk of the Committee: I do not have it with me, but we do have it, and I will bring it to the committee members for them to look at.

The Chairman: Good. I had thought I might see this retaining agreement before today, because I had the very same question. I did not realize that we had located it.

Mr Carrothers: If the budget is over because there is time having to be spent on cases that are more complicated than anticipated, that is one thing. If the budget is over because tasks have been undertaken that might not be within the purview we retained counsel for, that is something else.

If you are saying there have been meetings with people that have not been at the direction of the committee, perhaps that is outside the retainer, and we may want to clarify that as a means of keeping this budget more in line.

Mr Philip: Am I not correct in saying that the reason we went over last year was that at the time we set the budget, we did not realize that very complicated Ministry of Agriculture and Food case would come before us, and if that were separated, we would be considerably underbudget?

The Chairman: That is correct.

Mr Philip: It is not incompetent planning on our part, and really, in terms of percentages, we are about half a per cent over the budget in this one item.

The other point I would make is that it seems to me that we have had a number of changes on the committee. Even the chairman is relatively new to the Legislature, and we have had a change of clerks. With the exception of myself--I have been on the committee for a number of years--one of the consistent factors has been Bell. He does have a background and an immense amount of knowledge about the operation and the history of the Ombudsman and what is going on internationally in the field.

I think he served more than just the role of a litigation lawyer preparing the questioning and focusing some fairly complicated issues. He has provided a tremendous amount of information in a historical and comparative sense which I do not think we could probably get as easily via other sources, even though we have had good researchers. But even the researchers come and go.

If you look at the fees he is getting, I have had some experience of hiring lawyers, and I cannot hire incompetent lawyers at this fee. He is certainly a cut above the average lawyer I have had dealings with, with the exception, of course, of Mr Carrothers, and Miss Nicholas, I assume; I have not seen her in a legal capacity. I think we are getting value for money, and I suggest that we approve the budget.

Ms Bryden: I had a couple of questions on other items. I presume our researcher is not charged to the committee but is seconded from the--

The Chairman: That is correct.

Ms Bryden: The legislative library pays for that.

The Chairman: Out of the legislative research budget.

Ms Bryden: As long as it is provided for--that is the main thing--in some budget.

The other one is witness fees and expenses. Is this just a guess of what

we might authorize? Do we have to authorize every single case where we pay fees and/or expenses for witnesses?

The Chairman: I do not know.

Clerk of the Committee: The reason we placed the amount is, last year when we were reviewing expanded jurisdiction, we had two witnesses who came from London, Ontario, and we had no funds in our budget for their expenses here, so we went underbudget on theirs.

The chairman has suggested this year we make allotment for funds, just in case there is some witness coming before us and the committee decides to pay for the expenses. There is a committee decision, and if we do not spend the money, it will be in the budget.

1030

Ms Bryden: I think it is wise to have an allotment in there, particularly for expenses if people have to come from out of town to appear before us at our request. But have we authorized witness fees as well, in some cases, in the past?

The Chairman: We had the $500 for last year; I believe it was $500. We spent just a bit, because we had expanded-jurisdiction public hearings. It is my belief that we will not require witnesses in the coming year. It is not something we normally have before us. The Office of the Ombudsman and the ministries come under their own budgets and appear before us.

I would expect we really will not require that allotment, but it was a safety factor, just putting it in, in case something does come forward.

Ms Bryden: What if somebody whose expenses you are paying wants to bring an expert witness? He might have a higher fee, which the person bringing him would probably pay. Would we consider transportation for other witnesses?

The Chairman: I think that is why we have a miscellaneous budget at the end, because it is not anticipated that we would require a witness or an expert, and that we could get it out of the miscellaneous budget perhaps.

Ms Bryden: Thank you.

The Chairman: Anything else?

Mr Bossy: Just a point of clarification on the budget. It is an item: meeting per diem and travel per diem. What I see is that there are three days per diem for travel and three days per diem for meeting for the same days, 30 and 31 October and 1 November. Are we saying six days?

The Chairman: No, they are travel days when you are moving outside of the four--so three people.

Mr Bossy: But are we charging the same days? You are saying it is going to take three days to travel to Quebec City and three days for meetings. Is that what we are saying? It is just for a point of clarification here.

The Chairman: You have pointed out a mistake, Mr Bossy. It would be two days travelling. We should correct that.

Mr Bossy: To let you know it was the same day ahead and day before—I could see—

The Chairman: You are right. Taking that into mind—we are under travel and accommodation for the conference—we will reduce it to two days' travel. Is there any other discussion on the budget?

Mr Carrothers: Just to return to the legal counsel, Madam Chairman, I certainly do not object at all to the quantum or the amounts being put in. I think I would want to make the point again, both from my experience as chairman of a committee and as a lawyer, and as someone who has retained lawyers, that we may want to make sure, when we are looking at that retainer agreement, that the parameters, if I could use that term, are well understood.

Sometimes, these things have a habit of incrementally growing before you realize it and the frame of activity goes beyond what is necessary. I am sure that the retainer is correct, but I would perhaps ask the chairman to take a look at that when it comes through, just to make sure that Mr Bell and we understand what he is retained for and that he understands as well.

It is useful, in my experience, to look at that from time to time and review it with the lawyer to make sure it has not grown.

The Chairman: I really appreciate your comments. I had intended to look at it, just so that we are all clear on what his role is, because his role is a very valuable one. I do not think anyone would dispute that, and we certainly get value for money. We are a cheap committee. It just helps to have that discussion.

Mr Carrothers: We are a cost-effective committee, Madam Chairman.

The Chairman: A cost-effective committee, thank you. And I am sure we have reduced it by 10 per cent on our travel days.

I needed that because I go before the board, and that particular item is always a contentious one with them. It helps to know the committee has directed its mind specifically to that item on the budget.

Mr Carrothers: Just in defence of my own profession, if the Board of Internal Economy ever wanted to make the hourly rate more reasonable, I would suggest a $200-per-hour rate, if I might be so bold. That is far closer to the reality, the normal billing for counsel such as Mr Bell in Toronto.

I do not know if the board is at all interested in looking at that issue again, but we have a rate here which basically is not very much higher than a first-year lawyer. In fact, I think many law firms bill their articled students out at that rate, certainly not experienced counsel.

If you get a chance, Madam Chairman, you might review that with the Board of Internal Economy.

The Chairman: If they bring it up, I will certainly entertain a higher rate.

Mr Carrothers: I do not know how Mr Bell can do this, to be quite frank, at that rate.

Mr Philip: We have a problem with Mr Nixon, who has a certain bias against certain professions.

Mr Carrothers: It is a bias that is shared by many, not just Mr Nixon.

Mr Philip: It is not shared by me. I just wanted to make that point.

Mr Carrothers: I appreciate that.

The Chairman: Is there other discussion on the budget?

Did I have a mover, Mr Philip, some time ago? Did you move the budget as it is, limiting it to two days' travel?

Mr Philip: With the minor adjustment that Mr Bossy was kind enough to catch and the rest of us overlooked.

The Chairman: Thank you.

Motion agreed to.

The Chairman: We have nothing more on our agenda for today, but is there anything that any committee members wanted to bring forward to the committee today? Seeing none, I would suggest that we would be meeting again on 24 May. My understanding is that the Ombudsman is not available on that particular day, but she will be available during the weeks after that.

I will make sure that we have enough on our agenda to warrant a meeting on 24 May, and if not, we would meet the following week with her present.

The meeting adjourned at 1034.

STANDING COMMITTEE ON THE OMBUDSMAN

ORGANIZATION
COMMUNICATIONS FROM PUBLIC
CASE OF MRS H
CASE OF FARM Q

WEDNESDAY, 7 JUNE 1989

STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
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Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Substitutions:
Charlton, Brian A. (Hamilton Mountain NDP) for Ms Bryden
Lipsett, Ron (Grey L) for Mr Henderson

Clerk: Carrozza, Franco

Staff:
Wilson, Jennifer, Research Officer, Legislative Research Service
Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon

Witnesses:

From the Office of the Ombudsman:
Meslin, Eleanor, Acting Ombudsman
Morrison, Gail, Director, Investigations

LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON THE OMBUDSMAN

Wednesday, 7 June 1989

The committee met at 1020 in room 151.

ORGANIZATION

The Chairman: This is the standing committee on the Ombudsman. Today we are going through a number of points and you have your agendas before you. The first item on the agenda is to have a motion that allows our meetings to be transcribed. Would someone be prepared to present the motion?

Mr Carrothers: Yes; I move that, unless otherwise ordered, the transcript of all committee meetings be made.

The Chairman: Should it be carried?

Motion agreed to.

Mr Carrothers: Could we discuss the cost of that before we go on?

The Chairman: Do we have a report from the subcommittee?

Clerk of the Committee: We gave it to them and you have it there.

COMMUNICATIONS FROM THE PUBLIC

The Chairman: Item 2 is the adoption of a report of the subcommittee on communications from the public on Mr J and Mr Z. The reason why it was waiting is because I assumed this would be adopted by the party that is missing in representation today. The subcommittee which has Mr Philip, Mrs LeBourdais and Mr Pollock met on 11 May and we reviewed the case of Mr J and the case of Mr Z. We have the report before you and the committee recommended the following:

In the case of Mr J, that the chairman inform Mr J that it has considered his case and after careful scrutiny of all facts it has concluded that the Ombudsman's office has investigated his complaint fully and fairly.

In the case of Mr Z, that the chairman inform Mr Z that the Ombudsman's office investigation into his case was fair, unbiased and complete. It further recommends that the Ombudsman mail Mr Z a copy of his report translated into Croatian.

The individual had a little bit of difficulty with English, and although he preferred to correspond in English, there was a feeling that perhaps he did not fully understand the complexity of the Ombudsman's report and that by translating it into Croatian he would have an opportunity to review it thoroughly and understand that everything he did ask to be investigated was investigated.

The subcommittee approved this report and we are asking that the committee as a whole accept this report as well.

All those in favour?

Agreed to.

The Chairman: The subcommittee on communications will be meeting again. We have a fair number of cases before us. I think we have some four or five more, so we will be reviewing those in the next little while, we hope.

CASE OF MRS H
(continued)

The Chairman: The third item on the agenda is the case of Mrs H. We have before us today Eleanor Meslin, the Ombudsman of Ontario, and Gail Morrison, director of investigations. Mrs Meslin has had her temporary Ombudsman status extended until the end of June, as I understand, for now anyway. We welcome you here to the committee and we will enjoy the next few weeks anyway at the very least with you before us.

The committee made a recommendation on the case of Mrs H some time ago and there has been ensuing correspondence.

Mrs Meslin: Just for the committee's clarification, can I indicate that the report in Serbo-Croatian has been sent to Mr Z at the request of the committee? We have already done it. I am going to ask Gail Morrison to respond on the case of Mrs H.

Ms Morrison: For those committee members who may have forgotten who Mrs H is, she was a complainant who complained about the teachers' superannuation fund and the lack of a spousal benefit to her because she had married once her spouse had retired. Once her spouse died she was not entitled to a spousal benefit.

The committee supported the Ombudsman in this matter and made a recommendation in its 17th report. In that recommendation it recommended not only that the legislation be changed so that this injustice might be cured in the future, but it recommended the following, and I would just like to read the recommendation into the record, please:

"The Minister of Education, in conjunction with any other governmental organization he deems necessary, issue an ex gratia payment to Mrs H as soon as possible, effective from the first of the month following the date of her inquiry for same, until the amended provision is in force. Such a payment can be made...through the annual budgetary process, so that no question will arise as to the authority of the ministry to make the payments."

We have provided the committee chairman with correspondence on this matter since that time because we heard from the deputy minister, by an undated letter received in our office on 24 February, who suggested that the minister will be recommending to cabinet the amendments to the Teachers' Superannuation Act, including amendments which relate to survivor pensions for spouses who married former plan members after retirement.

That letter said nothing at all about the ex gratia payments, so we made an inquiry to the ministry and it said that was all the response we could expect. We forwarded that information to the chairman on 15 March and we would like to request the committee's assistance in this matter. Having made the recommendation, the matter is really in the committee's hands.

However, this puts the Ombudsman's office in a rather difficult situation. We accept complaints from individual complainants such as Mrs H, we

go through the investigation process, we make recommendations, we bring those recommendations here where its necessary, and in this case we had the support of the committee on the matter. We then are stuck with a complainant who is not getting what any of us recommended, and although the legislation will be changed, that is not really, as far as Mrs H, who is an 80-year-old widow, is concerned, much assistance.

1030

Our process is one that is complainant-based; that is, we need to be able to tell complainants what to expect of our process.

In some ways, it is very misleading to them if we support their complaints, make recommendations, bring them to the committee, have the committee agree with our recommendations and then have no further action taken on these matters. The ministry appears to find it not at all unusual to do nothing more. They have not sent us any further correspondence on the matter. I think that they had informed the committee that it was impossible for them to make this payment through their budgetary process.

But we have recently had the case of Mr O, which you may remember, a very old case, in which Management Board of Cabinet in fact has paid Mr O relatively recently a sum which has been outstanding for years. Management Board of Cabinet made that payment through its annual budgetary process. I myself cannot understand the minister's position that it is not possible for them to do the same thing.

Mr Bell: Just for further clarification, is it your understanding that the ministry's position is, notwithstanding the committee's specific recommendation, that it will not be implementing it?

Ms Morrison: That is my understanding.

Mr Bell: I should have finished it, I guess. Or is it the ministry's position that it is waiting upon the results of the debate of that report in the House?

Ms Morrison: The minister has never said that to us. The minister's only communication on the matter was a letter that you received on 24 February in which it mentions the amendment and says nothing about the payment, nothing at all. I followed that up with a call to the deputy minister's office, because it does not deal with the recommendation as a whole. I was provided with the information that there would be no further response from the ministry on this matter.

Mr Carrothers: I seem to remember there were a chain of recommendations on this one. I am wondering was that the final one, that there be an ex gratia payment, or what happened after that? Was there not some recommendation about something being referred to a committee that was discussing changes?

Ms Morrison: There were three recommendations. The first was, in general, that we submit it to the working group and that they deal with the general policy of pensions and payment to spouses of people who are receiving a pension and are deceased. The second was that we find some way of getting an ex gratia payment to Mrs H, because she was perhaps in a weak condition and may not survive the working group's decision.

Mr Carrothers: When you say second, was that in chronological order?

Ms Morrison: Yes. The third was that the teachers' superannuation fund do consider making payments to surviving spouses who have been denied a full dependant or survivor allowance.

Mr Carrothers: A nice array of recommendations.

Ms Morrison: That is right. What, in effect, has happened as a result of this is that the working group has come back with a recommendation that will provide for payment to survivor spouses. The Ministry of Education is prepared to table the legislation in the next few days, I hope, or weeks, I am not sure, but shortly. Its legislation that will provide for that is ready to be tabled and the only thing that has not been done is an ex gratia payment to Mrs H.

Mr Carrothers: Do we know what the position of the teachers' superannuation fund is in terms of making that payment ex gratia?

Ms Morrison: The teachers' superannuation fund has maintained that this is a matter for the ministry. In fact, your recommendation following a discussion at our last meeting was that the Minister of Education, in conjunction with any other government organization, that is, in conjunction with the fund if necessary, make spousal payments to any other surviving spouses who have been denied a full dependant or survivor allowance by the teachers' superannuation fund.

Mr Carrothers: This is a problem that exists in any pension fund. It is not peculiar to the teachers' superannuation fund.

Ms Morrison: It does not exist in the Legislative Assembly fund.

Mr Carrothers: No, but it exists, I would venture to say from my experience, in 95 per cent to 98 per cent of the pension plans in the country. Usually, when someone has retired and a fixed annuity has been bought, that has locked it in and that is the end of it.

I wonder if we should not find out what the ministry's position is and ask for an explanation perhaps as to why they are not doing anything. Maybe that would be the way to proceed here, to get them to tell us why they feel they cannot move on this at this time.

The Chairman: That may be a good suggestion, given that I have spoken with the individuals and so has the Ombudsman's office. It is hard for me to relay what they have indicated to me, but it is that they do not want to dip into the teachers' superannuation fund right now and they are not prepared to do it as estimates. Given that the superannuation fund right now is so tenuous at best, they did not want to unilaterally take the money out of it to pay Mrs H without legislative backing.

That is as I understand the ministry's position. We will take it into consideration, and when people are speaking perhaps they can respond to Mr Carrothers' suggestion.

Mr Cousens: I am not far from where Mr Carrothers is coming from, but I want to ask a couple of questions. Are there other precedents in which committee recommendations from our standing committee on the Ombudsman have gone to a ministry and it has not accepted those recommendations and has gone

a separate way without giving an explanation? Is this something that has happened? I have not been on the committee long enough to know if there are many precedents for it. If so, how have we dealt with it in the past? Have we gone back to the ministry soliciting, as Mr Carrothers is suggesting, an explanation or do we go the Premier (Mr Peterson) or to Management Board of Cabinet or to some other higher level?

Mr Bell: To answer that question, let me give you a brief bit of history. The history is in three phases, really. Initially, when the Legislature and this committee and the Ombudsman were kind of feeling their way along, there was no central policy on any of their parts as to what to do with one of these recommendations that came from this committee, and consequently in the initial stages it was more of a negotiated effort as to whether our recommendation would be implemented.

About two years after the office started, however, as these recommendation-denied cases came through the pipe, so to speak, it became very apparent that for the Ombudsman to be appropriately effective in his office, or her office as the case may be, there had to be the ability to go to the Legislature through this committee with a recommendation supported, if it was appropriate so to do.

About 1978, there started a series of this committee's reports that supported an appropriate number of Ombudsman's recommendations which the House debated and adopted, I think, with but one exception. In all of those cases those recommendations were implemented by the ministry or the governmental organization in question. From 1978 through 1982-83, there was a well recognized process and what you saw during that process in the latter stages was that ministries and governmental organizations were not waiting upon the debate in the House to implement the recommendations.

For reasons that probably are not relevant to this answer, around 1983-84--the clerk can correct me on the exact number--these committee reports got backed up on the order paper and there are a significant number of them now. There are at least three or four of this committee's reports that have yet to be debated by the House.

I will offer a personal view. I think ministries are aware of that and they are playing a waiting game. I should not paint the broad brush, but some ministries are not implementing the recommendations after they come from this committee. They are saying, as is available to them, "Well, we would like to see what the House says about this," etc,, so there is a bogging down.

I can answer this way as well. I cannot think of a case where the House has adopted this committee's recommendation that supports the Ombudsman's recommendation that a governmental organization has not implemented. Forgive the double negative.

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I can think of cases where this committee has recommended support for an Ombudsman's recommendation, but in the House during the debate on the report, the minister in charge has stood up and said, for his good and sufficient reasons, "I don't agree," and the House has, exercising its judgement, said no and carved that one out. But I am not able to give you any insight on recent views of this House as to adopting, supporting or otherwise dealing with this committee's recommendations. I believe it is fair to say that there is a

change in perception among the public service as to the Ombudsman's so-called ultimate sanction process.

Mr Cousens: Thank you. That is helpful, because I had forgotten about the backlog.

Madam Chairman, it was unanimous, I think, in this committee that we supported the case of Mrs H.

The Chairman: Not all the recommendations were unanimous.

Mr Cousens: But the recommendations on the ex gratia payments and the recommendations we are really concerned about here did have the support of this committee, as I recall; the full support of the committee.

The Chairman: I recollect it did not have the full support but that we did make these recommendations without.

Mr Cousens: Okay. Having done that, I would like to endorse any effort to expedite the response to the case of Mrs H. If a letter to the ministry is helpful, I also I would be quite prepared to go to our House leader and suggest that if there is any way in which these can be tabled more quickly in the Legislature, and if there is any way of getting rid of the excuses for the Ministry of Education, I think it is important. That gives justification for our committee, to have a continuing purpose.

The Chairman: In reply to that, from Mr Carrothers, I am just looking at the report. There was dissent by two people and it was actually written. It is the first time we have had a dissent on the case. It agreed with the first two parts of the recommendation, which was that the working group really make a concerted effort to try to provide for surviving spouses, and second, that legislation be tabled to accommodate that. Third, the ex gratia payment for Mrs H was dissented upon, as I recollect, and that is how our report reads.

Mr Cousens: That is interesting.

The Chairman: Mr Bossy and Mr Lupusella are shaking their heads, because they felt the legislation—the legislation part has been prepared, as I understand it, and is about to be tabled. We are down to the ex gratia payment in my view, at this point.

Mr Carrothers: Mr Cousens has of course mentioned the ultimate position or place where these reports go, to the House. But knowing its agenda, I wonder if it would not be quicker, at least as a start, to ask the ministry to come in. There may be facts or things we do not really have before us and it would give them an opportunity to explain it. I wonder if that would not be the fastest or at least the best way to start. Then we can make other decisions at a later point based on that.

The Chairman: Let me just remind you that this report has been tabled. It has already been tabled. It is just a matter of bringing it up on the agenda. We could so do.

Mr Bell: Just to further assist on Mr Carrothers' point and to remind the committee again of some of the further chronology, the first recommendation you made was unanimous. It was a recommendation going to the substance of the payment issued to the individual. The recommendation reads

that the ministry cause the Teachers' Superannuation Commission to pay, and there was the stipulation that within three months it come back to this committee. That three-month period has long since passed.

What happened was that the ministry responded directly to that and said, you will recall, "We've struck a working group to examine the Teachers' Superannuation Act." You then, again unanimously, directed the working group to deal with her issue as soon as possible. Then there were further events reported to you that gave rise to the two recommendations the chairman read to you, and those are the two wherein Mr Bossy and Mr Lupusella dissented.

My recollection is, and I think it is reflected by the text of the dissenting report, that the concern of both was to the manner in which the subject matter of the last two recommendations was raised. I am reading: "In their view, as a matter of procedure, the Ombudsman should wait until a reply is received from the Ministry of Education's working group regarding Mrs H before he requests the committee to consider any further recommendations."

I took that, and I think everyone did, that it was not a dissent as to the substance of the payment recommendation but a dissent as to the timing and the waiting upon that working group to come forward. If that is so, what I would suggest in addition to Mr Carrothers' suggestion is that you need to hear from this working group either directly or indirectly through the ministry as well.

I believe the chairman of that working group is a former assistant deputy minister, Duncan Green. If he is not the chairman, I know he is certainly an integral part of that group. You might consider speaking to them directly as well before deciding any further steps.

Mr Charlton: Just on that issue specifically, I would be in support of pursuing this matter further and starting that pursuit by having the ministry and the working group report to this committee on the issues we have recommended.

Ms Morrison: For your information, in the letter we received in our office in February from the Ministry of Education they say, "As a result of the working group's deliberations, the Minister of Education will be recommending to cabinet that the Teachers' Superannuation Act be amended in several areas, including that which deals with survivor pensions for spouses who married former plan members after retirement."

In our view, we have heard from the working group technically. What you may want to do is find out more about their reasons for not implementing the ex gratia payment, but it seems clear to us that the legislative part of the recommendation is going forward.

The Chairman: I understand it has. I would not want to be too presumptuous, but as I say, I anticipate it will be tabled shortly and it will include it.

The problem is Mrs H and her perhaps frail situation and the possibility that by the time it gets passed into law, she may not be alive any longer. It is delicate.

Can we have any more comments on the suggestion made? Was that a motion, Mr. Charlton?

Mr Carrothers: I will make it one.

The Chairman: Can you make it one?

You moved that the Ministry of Education come before us so that it can respond directly to their response and also there was some—if they need the working—

Mr Carrothers: Are they a body that still exists or are they now gone? How formal a body was it? In terms of asking somebody to come forward, I am wondering if it was a temporary thing and if there would really be any entity we could ask.

Mr Charlton: Regardless of its present status, I do not think there will be a problem in terms of having a report from that body.

The Chairman: Maybe they can just give us the information from the report if they cannot actually get a person to appear before us; something like that. We will do that, hopefully, in the next week or two. That is our motion.

Mr Carrothers: It sounds like an excellent motion to me.

The Chairman: Does everybody have that motion? Mr Carrothers will repeat it for us.

Mr Carrothers: Do you want it repeated?

The Chairman: Yes. I had nods. They did not quite get that motion.

Mr Carrothers: All right. The motion is that we request the Ministry of Education to come and talk to us about why it feels it cannot move at this time and also that we at least try to get something formal from the working group, if it still exists, as to the recommendations it made on this subject, if it can do that. I do not know the status of that kind of document, if it is a cabinet thing or not, so I am a little hesitant to be too strong there.

Mrs LeBourdais: I am just wondering, because time is of the essence and we have already lost a lot of time in this case, could some dates be put to that so that it is by next Wednesday or the following Wednesday?

The Chairman: Within the next two weeks? Is that acceptable to your motion?

Mr Carrothers: By next Wednesday?

The Chairman: By next Wednesday or the following Wednesday. Within two weeks.

All those in favour? Everybody in favour?

Motion agreed to.

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Mr Cousens: Is there anything else we can do to help expedite this?

The Chairman: Stop ringing the bells so that we can table it, if I could jump in with that.

Mr Cousens: I had not thought of that one. I will not let them ring until we get her back, unless something happens.

The Chairman: I was just making a suggestion as one way we could table it.

Mr Cousens: It was a good one, though. I like that.

The Chairman: Did you have any constructive suggestions, before I leaped in with mine?

Ms Morrison: We could take up a collection. No, I am afraid there is nothing much we can do except find out why this has not been implemented. It does make a great difference to our process and to the sort of sense that we have in working on these kinds of matters. I have a lot of staff who worked very hard to bring these matters forward, and it would be rather discouraging to them if, after this stage where the committee is so supportive, the thing disappeared into the void. I would really appreciate the expedition of this matter.

The Chairman: Perhaps you could work with the clerk to ensure that the ministry comes before us within the next two weeks.

CASE OF FARM Q
(continued)

The Chairman: Item 4 on the agenda is the case of Farm Q. We met to discuss Farm Q for three days during the last week in March. The Ombudsman has something to refer to in there. Although we have not discussed it, I think if you look at our draft report that we have before us, which we will be discussing in camera, it might be beneficial to look at page 3, if you have that draft report with you, because they are the recommendations that we made and they are the public part of the recommendation.

It is page 3 of the draft report prepared by Jennifer. The recommendations are on page 3, and that may assist the committee when the Ombudsman brings up this issue. Okay. Does everybody have it? Mrs Meslin.

Mrs Meslin: I come before the committee to report on our efforts to come to some agreement with the Ministry of Agriculture and Food on an adversarial process. They have indicated to us that the only process they will consider is that the matter should be resolved by court action. We have put before them a number of alternatives, and they have rejected all of them, including possible settlement alternatives that we suggested might avoid an adversarial process and all of the expenses that might go with it. But in a letter to us, we have been told that the ministry's suggestion is court action, and the Office of the Ombudsman is opposed completely to that suggestion.

The Chairman: Why?

Mrs. Meslin: Our reasoning for opposing it is primarily that we are back to square one again. To do this at this time will be exceptionally costly. The ministry has also indicated to us that it is not prepared to share any of the costs, that the Farm Q people will have to pay everything, from its

point of view. We look at it as a tremendously costly effort and we think there are other ways that we could save both the ministry and the government a lot of money.

The Chairman: We were discussing the alternatives, but I just want to direct you to the actual recommendation that we made, which said "The parties are urged to come to some agreement on the process." This is the last part of the second recommendation on page 3. "If they are unable to agree, the committee will reconvene and decide the process after hearing submissions from the two parties."

As the Minister of Agriculture and Food (Mr Riddell) is not here today, I think perhaps it would be appropriate to present your submissions, or why the other processes, when both parties are before us, unless there is some—she could not hear me. All those words of wisdom are not being translated into French. Sorry.

Unless someone has some alternative suggestion, given our recommendation, I am a bit hesitant. What the Ombudsman staff is saying, I gather, is that it wants the Minister of Agriculture and Food to come before us to discuss our recommendation.

Mr Carrothers: I was just going to say I would concur. I think, given the nature and complexity of this and given the decision we did make, we should proceed that way and hear really what is going on and let the parties discuss it in the presence of—

Mrs Meslin: Just for the committee's clarification, I have been in correspondence with the deputy minister and she has agreed that they would be prepared to come before the committee next week.

Mr Carrothers: Sounds all arranged to me.

Mr Bell: Of course, the ministry and the deputy will speak for themselves. Based on your discussions thus far, though, what do you understand to be their reason for preferring the judicial process as the choice within the phrase "some adversarial process"?

Mrs Meslin: From their letter to us, I think they are basing it on recommendations from the Attorney General's office. They asked for some legal advice and the legal advice they got was that it should go to court action.

Mr Bell: Were you given an explanation for the—maybe I should be asking if you can share that letter with us.

Mrs Meslin: I can certainly share the letter with you. I just do not want to prejudice their case to you.

Mr Bell: Oh, I do not think you will do that.

Mrs Meslin: I can certainly make copies of it. But if I can read it into the record, there is a section of the matter that the Attorney General (Mr Scott) has suggested which says, in part, and this is from the letter of the Attorney General:

"In my opinion, the circumstances of this case require the benefit of the discovery process afforded by the rules of court applicable to court proceedings, and it is my opinion, based on my experience with various forms

of dispute resolution, that the most effective and efficient way of dealing with a claim of this kind is to require Farm Q to initiate a proceeding in a court of law, where the circumstances of its claim can be properly scrutinized. If the claim is proven, then of course any obligation would be honoured."

Mr Bell: Have you taken a position on whether the process should include the discovery process as described?

Mrs Meslin: We have not taken a position at this point on that at all.

Mr Bell: Will you take one and have it ready for next week, please?

Mrs Meslin: Certainly.

The Chairman: You will provide us with a copy of that matter as well for the committee. The clerk will look after that for us.

Any further comments on this particular item on the agenda? I think we had agreement that the deputy minister or her designate would come before us next week. I think I noticed agreement. Could everybody nod for the clerk? There, we have agreement.

Is there any other business before we go in camera at this point? Mrs Meslin?

RECOMMENDATION-DENIED CASES

Mrs Meslin: We were just asked to inform the committee the last time we were around of our expectation for recommendation-denied cases, so that you can think about when you are going to hear them. At this particular point, we think there will be three, possibly four, cases to bring before the committee.

The Chairman: You will be tabling your annual report some time later this month?

Mrs Meslin: By the end of June, yes. But the annual report has only one in it. The point is that we have another two, possibly three, that will be ready at what we assume will be the time, so we will special-report those.

The Chairman: Do you anticipate that these cases are of the variety that take about half a day to possibly one day each or are they similar to Farm Q, which required additional time?

Mrs Meslin: No, I would think most of them are in the normal run of cases, between a half a day and a day.

The Chairman: You think one week for those three cases and additional time for the annual report would be sufficient?

Mrs Meslin: Yes.

The Chairman: That is helpful for the committee, because I think we have booked two or three weeks in our budget. I think that would be appropriate and that will be some time after the Legislature rises.

If there is nothing further, then see you next week. Is there anything further from the committee before we go in camera; any further discussion or points? Okay. We will now go in camera.

The committee continued in camera at 1100.

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STANDING COMMITTEE ON THE OMBUDSMAN

CASE OF FARM Q
CASE OF MRS H

WEDNESDAY, 14 JUNE 1989

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Wilson, Jennifer, Research Officer, Legislative Research Service

Witnesses:

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Meslin, Eleanor, Acting Ombudsman
Morrison, Gail, Director, Investigations

From the Ministry of Agriculture and Food:
Dombek, Carl F., Director, Legal Services

From the Ministry of the Attorney General:
Marshall, Tom C., Director, Crown Law Office, Civil

LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON THE OMBUDSMAN

Wednesday, 14 June 1989

The committee met at 1012 in room 151.

CASE OF FARM Q LTD
(continued)

The Chairman: I would like to call this committee to order. This is the standing committee on the Ombudsman and we are meeting today to discuss a denied case, Farm Q. We have before us for the Office of the Ombudsman, Eleanor Meslin and Gail Morrison. On behalf of the Ministry of Agriculture we have Carl Dombek and Tom Marshall.

I gather that as a result of our recommendation that we made some time late in April, there has been an inability to come to a consensus on an alternative mode of deciding any—I want to get the recommendation before I do it.

The committee recommended "that the issues of loss, causation and reliance should be determined by some adversarial process. The parties are urged to come to some agreement on the process. If they are unable to agree, the committee will reconvene and decide the process after hearing submissions from the two parties."

The Ombudsman came before us last week and indicated that indeed you were unable to agree and we asked that both of you appear before us as per our recommendation on this case.

Could I suggest perhaps that the Ombudsman make any opening remarks that are needed, followed by a reply from the Minister—the Ministry of Agriculture and Food? I have just tried to promote you, although I am not sure that is a promotion sometimes. We also have before us in this regard a letter dated 1 June 1989 to Rita Burak, the deputy minister, and accompanying material for your information. Mrs Meslin?

Mrs Meslin: I am going to ask that Gail Morrison carry this, as she had carried through the case and has the most familiarity with it and will represent the Ombudsman's office today.

Ms Morrison: I provided the committee with some copies of correspondence last week that I assume you have had an opportunity to look at. In that correspondence, you can see the chronology of what has happened since we met in April.

We were advised by the Ministry of Agriculture and Food that it wanted to consult with the Attorney General's office. Subsequently, we provided them with a couple of suggestions as to ways in which the matter might be resolved. Particularly given the high cost that is likely to be incurred in an adversarial process, one of our suggestions was that the complainant would be open to suggestions of settlement and that the potential cost of the adversarial process might give a guideline as to the quantum of settlement that might be appropriate to begin to think about.

Since that suggestion, we have had a letter from the Ministry of Agriculture and Food in which it provides us with the Attorney General's opinion, which is that the matter should be settled through an application to the court. We understand from their letter that essentially what they mean is that the matter should go right back as if it were an original lawsuit, beginning at the beginning. This of course will require enormous costs and no mention of costs was made in the ministry's letter to us.

It is our position, as set out in the letter, I think, to Ms Burak by the Ombudsman that it would be inappropriate for Farm Q to bear the costs of such a trial. In fact, we feel very strongly that the suggestion that the matter go back to court now as if it were originally a court application is one that is very much not in tune with the Ombudsman process.

If the Ombudsman is to mean anything at all, then when a complainant comes to us he must have a possibility that the Ombudsman could support the case and make a recommendation that would have some meaning to the complainant. In a case like the case of Farm Q, we went through the whole process, came to this committee and this committee did not send us away saying, "We do not support the case of Farm Q."

It would be very unfortunate, I think, if the Ombudsman process is subverted by this kind of conclusion to a case. It essentially would mean that when we support a case, it would always be open to the ministry to suggest the matter be taken back to court as it would have been in the initial case. It is clear from all the years we have been coming to this committee and the numerous investigations we have done, some of which have been supported and brought forward to this committee, that the Ombudsman process is intended to be one that can be chosen by a complainant instead of the court process.

1020

In the case of Farm Q, that is exactly what happened. Farm Q chose the Ombudsman process partly because of the staggering costs that might be incurred through a court process. Of course, there are other reasons besides costs why it is difficult to sue the government, but that is certainly one of the considerations.

If this committee decides that once the Ombudsman has supported the case and brought it forward to this committee, it is appropriate to send the whole issue back to be decided by a court as at first instance, then complainants coming to us will really have no viable remedy. Their remedy will be one of two things: We can either not support the case, which we often do, or if we support the case it could come as far as this committee and this committee could send it back to have the whole matter decided by a court, which is not much of a remedy for a complainant. We feel very strongly that this is inappropriate.

In the particular case, the committee recommended that an adversarial process be adopted to decide the damages. There are a number of adversarial processes, some of which we have suggested in our correspondence to the ministry, including a rent-a-judge system, an arbitration and a number of other kinds of mechanisms for deciding these kinds of questions. We have also suggested that a settlement might be appropriate. I think we have to be mindful that just because this is a ministry does not mean the money does not in the end come from the taxpayers' pockets. We cannot just recommend in good conscience that the most expensive process possible be adopted.

We feel strongly that Farm Q should not have to pay the costs, but we also feel fairly strongly that this has to be a responsible decision as to a process that will not end up costing the taxpayers zillions of dollars. To the extent that a costly process might be involved, that leaves some room for possible settlement. Although the ministry seems to suggest, in the memorandum we received this morning, that Farm Q would not be amenable to an arbitration process, it would be; that is exactly what it is expecting.

The fact there is not much point in Farm Q sitting down with ministry officials any longer is exactly the reason it came to the Ombudsman and went through the whole process of coming to this committee. It may not be appropriate for Farm Q and the ministry to get together and negotiate, but an arbitration process is obviously possible. I think we have looked into Farm Q's claims of expenses enough to be able to say something about the quantum of settlement that might resolve the whole matter without the expense of a long and difficult arbitration process.

Our main concern, however, is really one of procedure. If this committee ends up sending cases that we bring to it as recommendation-denied cases back to the court to be started all over again as part of the court process, then I do not see very much use in our bringing recommendation-denied cases through the process. It does not make sense to me as an add-on to the Ombudsman process.

The Chairman: The Ministry of Agriculture and Food.

Mr Dombek: Thank you. I will not introduce Mr Marshall since you already did it, Madam Chairman. Once again, I would like to thank you for your time and patience in listening to this matter and in particular, giving the ministry an opportunity to present its submission.

As a preliminary to outlining our position, the ministry wishes to state that it has the greatest respect for the Office of the Ombudsman. In many cases, the ministry when advised of a complaint works diligently with the Ombudsman's staff to resolve the issue to everyone's satisfaction. It is very difficult when, after careful reflection, agreement cannot be reached on the Ombudsman's position. Similarly, the ministry is very sensitive to responding to the resolution of this standing committee.

This issue has been considered very carefully by the ministry. In this case, we also asked for and received the advice of the Ministry of the Attorney General. We have reviewed that advice and the position of the Ombudsman. As I have stated before very carefully, I am afraid we cannot agree with the position of the Ombudsman on the type of adversarial process that should be used.

On 30 March 1989, this committee made the following decision: "The committee has come to a decision and has decided the following question in the affirmative: whether the ministry should compensate the complainant for losses suffered, if any,"--and I emphasize that--"as the result of and to the extent of the complainant's reliance on the home test data in the selection of pigs for purchase and breeding.

"The committee has also decided that the issues of loss, causation and reliance should be determined by some adversarial process. The parties are urged to come to some agreement on the process. If they are unable to agree,

the committee will reconvene and decide the process after hearing submissions from the two parties."

Once again, I emphasize the fact that the issues were loss, causation and reliance. I believe this is somewhat contrary to what Ms Morrison said, limiting it just solely to the compensation issue.

Our careful reading of these decisions indicates two things. First, we believe the committee could not determine whether any losses were suffered by the complainant. This is due in part to the fact that the ministry and the Ombudsman agreed that the issue of the amount of compensation had not been the primary issue in their discussions. Therefore, it was agreed by the ministry and the Ombudsman that no evidence would be presented concerning any alleged loss.

Second, and of much more importance, we believe the committee could not resolve the other issues of reliance and causation. The very technical and complicated nature of this complaint and the expert evidence of the ministry's witnesses placed these issues into question.

With this as background, I would point out that the issues of reliance, causation and loss are the usual questions that are determined by a court of law. As such, we believe the ministry should be afforded the legal right to be judged by a court of law with its panoply of protections.

This issue has government-wide importance. It is not only the Ministry of Agriculture and Food that has programs on which the public acts. To be judged without the opportunity of being able to present an adequate opportunity to question the complainant in a court of law is important to the basic principles of justice and fairness. This is particularly so given the technical nature of the complaint.

Furthermore, the ministry raised concerns at the committee hearing regarding issues of contributory negligence by the complainant and the possibility that the complainant may have a legal action against the supplier of the pigs. These issues were not fully canvassed at the committee hearing, but would be extensively reviewed by a court. It should be noted that arbitration or mediation would not examine the issue of whether the supplier of pigs did not fulfil his contractual obligations to the complainant.

The ministry has agreed to expedite any court action. For example, a quick exchange of documents could lead the parties to the discovery stage at trial. Also, the ministry would agree to the trial being heard in an area where the complainant lives. These procedures would also lower potential legal costs.

I have tabled with you a copy of the legal opinion provided by Mr Marshall, and for those reasons and the above reasons the ministry recommends that the issues be decided by a court of law.

There is one other matter I would like to point out. This ministry knew this was a very complicated case. You probably do not have the document in front of you, but you will recall that the ministry tabled five volumes of material. At tab 127 of that volume, you would find a letter from Dr Switzer, the former deputy minister to the Ombudsman. This letter was dated 26 June 1986, almost three years ago. At that time, Dr Switzer canvassed quite extensively the legal difficulties that would arise from a finding of

negligence by the Ombudsman and he suggested at that time that the matter should go before the courts.

I do not think I have anything further to add at this time. If there are any questions the committee would like to ask either myself or Mr Marshall, we would be pleased to answer them.

1030

The Chairman: Thank you, Mr Dombek. I have a list of people who want to ask questions, but I just want to draw the attention of the committee to the fact that Mr Marshall's opinion is under the letter from Mr Dombek to the clerk of the clerk of the committee. It was just received yesterday so it would be dated received 13 June, for those committee members who did not already have that in front of them.

Mr Philip: My first question is to Ms Morrison. I have been a member of this committee for seven or eight years. I have never had a ministry come before this committee and tell us that the complainant should start the process over again and go before a court of law. You have been with the Ombudsman for a great number of years. I will not ask you how many years, but it seems to me you were there from the time I joined the committee. Do you know any other instance where a ministry has actually said, having gone through the whole process: "We are sorry, then. We do not agree with the conclusions of the Ombudsman and the complainant should go to a court of law"?

Ms Morrison: I do not recall a case in which it came to the committee and the suggestion was made. We often have discussions early in an investigation with the ministry saying that the complainant could go to court if he wished to go to court.

We do not have any way of telling before we investigate a case how complex or difficult it will be. Neither do we have the discretion to tell complainants to please go away because their case is going to be complex and messy and we do not feel like investigating it.

It seems to me the court process is quite a separate process, which of course some people elect to use because the Ombudsman can only make Recommendations. But it is this committee's job to give the recommendations of the Ombudsman some power. In my recollection, there has never been a case where the committee said: "Oh, that is a good idea. Why do we not start all over again."

Mr Philip: The first major case the Ombudsman dealt with when he was first established was the Pickering land claim case. That went on for a number of years. A decision was made that in fact people were compensated. Would you say this case is as complicated as the Pickering land claim case, which was the initial case on which this Office of the Ombudsman ground its teeth and got its first opportunity to show the value of the office?

Ms Morrison: I would say it is not nearly as complicated, just given the sheer numbers that were involved in the very complex issues of land claims in the Pickering case. I was not involved in that investigation, but I have read the results of the hearings that subsequently decided compensation.

Mr Philip: Is it fair to say that at that time the government of the day could have simply thrown up its hands the way this Ministry of Agriculture

and Food seems to be doing now and said that these people could get together all of the numbers, the land owners, and simply sue the government?

Ms Morrison: That question did not arise because the committee that considered the Ombudsman's recommendations took its job very seriously and recommended the Ombudsman be supported in his determination that the Pickering land owners should be compensated.

Mr Philip: I guess my concern goes beyond this case, and that is that if we allow this recommendation, then why have an Ombudsman's office in the first place and why should this committee exist? If the purpose of an Ombudsman is to give ordinary people an opportunity to choose an alternative and less expensive route, then the moment you allow a ministry the precedent, or the moment this committee allows the precedent of saying that when things get tough or complicated, simply tell the complainant to forget his or her rights under the Ombudsman Act and go to court, you might as well abolish the committee and abolish the Office of the Ombudsman.

I know you would agree with that, but I would like a comment from the ministry on that. Why have an Ombudsman's office if you are simply going to say that when things get complicated, let the complainant go to court?

Mr Dombek: Mr Philip, I would like to comment on a couple of things. I too am quite familiar with the Pickering case. It was one of the first cases that was going on right after Mr Maloney had been appointed. It was a very complicated case due to the environmental impact of the situation and the large number of people involved. This is not to say that this case is not as complicated, but it is complicated in a completely different manner.

We are talking about some very highly technical, sophisticated scientific information and evaluations, even to the point that there was disagreement between the Ombudsman and the expert the ministry had testifying for it at the last hearing. I do not think the two can be equated in that regard. The fact that we are talking about this highly technical information, I think sort of puts it out of the realm of the Pickering case.

As I said at the beginning, the ministry really does feel that the Ombudsman's position is very important. I was formerly director of the legal branch of the Ministry of Correctional Services. At that time, there were a vast number of complaints from the inmates of institutions to the Ombudsman. I recall the minister of the day indicated to this committee and indicated to the then Ombudsman that he felt the office was great because it operated as a safety valve for that ministry.

I think that opinion has been carried on through other ministries. The present ministry, right from the minister on down, really feels that the Office of the Ombudsman is important, but I think we also have to remember what the purpose of the Ombudsman is. Is it to be an alternative to a court action? If I, as an ordinary citizen, were to have a dispute with the government over a contract and the government decided not to pay me because it felt I did not honour the obligations of my contract, would I be able to come to this committee or come to the Ombudsman and seek redress?

There are times when we feel the Ombudsman system is not appropriate. That is probably a general feeling throughout most government ministries and agencies. Right at the very beginning of this complaint process, we advised the Ombudsman, and we had discussions with the complainant directly, that we

felt the matter should be settled in a court of law. For whatever reasons, it did not go that route.

However, as I indicated, almost three years ago to the day, we again brought these concerns up and indicated very serious concerns as to what the legal ramifications were. We tried to advise the Ombudsman's staff of the problem at that time. As I said, we have a great deal of respect for this office. We feel this office can do a lot of good and in the past it has done a lot of good, particularly with the Ministry of Agriculture and Food. There are a number of complaints that are resolved without even getting to the point where the director of the investigations group has to get involved. Those complaints are dealt with as quickly and as diligently as ministry staff can. Unfortunately, we do not feel this is a case where that would be an appropriate remedy.

Mr Philip: This committee has the right, you have the right and any other citizen has the right to recommend a change in an act. I want to ask you a very simple question: Do you feel this committee has the right to ask someone to give up the privileges he has under a statute of this province? Is that not what you are asking us to do? You are asking us to say to a complainant who has a right under this act, "Notwithstanding the fact that there is a law in Ontario which gives you this right, we are recommending that this right not be exercised." Who gives you or me the authority to tell a citizen that he should not exercise this right under a statute of Ontario?

1140

Mr Dombek: I think there are rights of the citizen and there are rights of the government agency. I think we have to keep in mind that in this particular case there is one technician who was involved in these readings. There could have been some jeopardy to his career. A lot of factors could have taken place. Certainly, that individual had some rights. Certainly, I think the government also had some rights.

Mr Philip: May I stop for just a moment, though, on that example. That technician has rights under a series of other acts to protect himself. Right now what we are talking about is the complainant's right and the complainant has a right under this act. You are asking that this committee make a decision that this right be waived. I suggest to you that I do not believe this committee has that authority, to do that. I do not believe it is appropriate for you to ask a citizen to waive his right given to him by the Parliament of Ontario.

Mr Dombek: Neither I nor the ministry is asking anyone to waive his or her rights. I refer you back to what this committee decided. I do not think we need to go through the evidence again, but it seems to me that in looking at that decision, which seemed to be very carefully worded, there was, I would imagine, a fair amount of discussion in camera. It was not a decision that was made very quickly anyway. I would think a great deal of thought was put into the wording. I am just interpreting this committee's wording. It would be far from me or the ministry to ask anyone to waive his rights. I could not even think of doing that.

Mr Philip: I have just one last question and then maybe I can go back on the list, because I want to deal with some of the specifics of your 13 June letter, and some other members such as Mr Cousens I know have some questions. Under this act, a person has the right to have an adjudication. Now if we said: "No, we are not going to do anything further. Go to court," how

can you come to the conclusion that we are not asking a person to waive his rights under the act?

Mr Dombek: I would suggest, and I do not want to get too technical legally, that the citizen has the right to make a complaint to the Ombudsman. He does not necessarily have the right to an adjudication.

Again, I am referring you back to the decision of this committee. I cannot do much more than that. It said, "The committee has also decided that the issue of loss, causation and reliance should be determined by some adversarial process." That was after almost a three-day hearing before this committee. It was a very difficult case, I think, for this committee. As a result of that decision, it seemed to me the committee had a very difficult time in coming to a conclusion. I can only refer you back to that.

Mr Philip: I think your selection of what the committee decided is somewhat selective. First of all, the committee made an adjudication that he or she should be compensated. What it sent to arbitration was the amount of the compensation or the details of that.

The person had the right under this act, and you still have not answered this question, to go to an independent adjudication by the Ombudsman. The complainant did that and the Ombudsman came out with a decision. The decision was then referred to this committee. So far, the complainant was exercising his powers under the act. Now you are saying that because of the complexities of implementing the decision of this committee, that complainant should waive his rights under this act which he has followed at some expense to himself; maybe not as much as if he had taken his alternative course, which would be to go to court.

I say to you, then, if you do this with this case, you are setting a precedent that will allow any ministry to come and say, "Whenever we have problems reaching a satisfactory conclusion, we will throw up our arms and tell them to go back to court." If you do that, you might as well abolish the Office of the Ombudsman.

Mr Dombek: There are two things, two issues. First of all, I would like to comment on the point Mr Philip made, that I was being selective. I would ask this committee to go back to the transcript. I read the entire decision of this committee. Would you like me to read it again? I read it in my opening statement. On 30 March 1989 this committee made the following decision:

"The committee has come to a decision and has decided the following question in the affirmative: whether the ministry should compensate the complainant for losses suffered, if any, as the result of and to the extent of the complainant's reliance on the home test data in the selection of pigs for purchase and breeding."

I do not believe that was a finding that compensation was payable. In the second part of that decision the committee further decided as follows:

"The committee has also decided that the issues of loss, causation and reliance should be determined by some adversarial process. The parties are urged to come to some agreement on the process. If they are unable to agree, the committee will reconvene and decide the process after hearing submissions from the two parties."

I think that is the decision of the committee. If you look at the transcript, there is an interjection where I ask the Chairman if she would read that again. She did, but she also indicated that copies would be provided. That was the end of that part of the hearing.

Mr Philip: What--

The Chairman: Just a second, Mr Philip: Mr Dombek, I think you had a second response as well.

Mr Dombek: I do not think I am being selective, Mr Philip. I think I am trying to be as fair as possible.

The second point is we feel that because of the decision of this committee that it could not come to a determinative conclusion on the matter, it suggested an adversarial process should be followed. It was not the ministry's position to say, "Oh, let's go back to the courts." That was not what we said at the beginning of this hearing. What we did was we came and presented our case as best as we could. We presented a lengthy case. There was, as I said, three days' worth of submissions by both parties.

Obviously, this committee made a decision and I think we are now here to decide on what adversarial process would be appropriate and not whether the ministry is saying, "Well, let's scrap the whole thing and go back to the courts." I do not think that is really the issue.

Mr Philip: The issue surely is that the recommendation is that if you could not come up with a process, the committee would impose a process on you. Now that is quite different from telling the complainant: "We're sorry. We're not going to handle it. Go to court," and that essentially is what you are asking for.

Mr Dombek: We are asking you that the process you should pick is the one that would involve the courts of law.

Mr Philip: If you read the recommendation of this committee as suggesting that one of the processes might be a court of law, then I suggest you are not reading it very correctly.

Mr Lupusella: Ms Morrison, I have a simple question. I was a little bit concerned that in the course of your presentation you displayed a little bit of scepticism in case the committee's recommendations would not be carried out. Just for my own benefit, would you please tell me which statute or which act or section of any act states that the committee's recommendations are binding?

Ms Morrison: I am sorry if I suggested or seemed to be cynical about the committee's powers to recommend remedies for complainants. I do not think I was intending to suggest that the committee's recommendations are somewhere written in stone.

The usual course followed when we bring a recommendation to this committee is that if the members of the committee, as representatives of the people in the Legislature and the Legislature as representatives of the people of Ontario, agree that a ministry, which is after all part of the government that is the people's government of Ontario, ought to do something, then that ministry does it. It is part of the kind of responsibility of the ministries

to the Legislature that when the Legislature tells them to do something, they do it.

It has happened because we have been in operation for a long enough time but it has now come to pass that when we bring the matter to this committee, it is very, very unusual for the ministry not to implement what the committee says without waiting for any further direction, and I think the process works very well. What it does is provide direction to the ministries about how the government believes they should behave with respect to this particular complainant.

1050

Mr Lupusella: In other words, you are telling me that the committee's recommendations are carried out in the light of the ministers' or ministries' co-operation, not because the committee's recommendations are binding, because we are not here to dictate laws or pass laws as a result of our recommendations.

Ms Morrison: In fact, the only time that the matter has come under debate in the Legislature, there was a debate as to the power of the recommendations of the committee. It was decided--if I recall correctly, and it is a long time ago--that once the committee's recommendations had been brought forward and adopted by the Legislature, they had the force of law because the Legislature had made them formal through its debate on the recommendations.

As I was saying, over the past few years, it has become quite normal for ministries not to wait for that to happen, to be satisfied that once this committee makes a recommendation, this committee has the authority to speak on behalf of the Legislature and the ministries go ahead and implement the recommendations of this committee without waiting for a debate in the Legislature. That has been the normal course.

Mr Lupusella: So again, the process is based on the premise that as a result of good political will, these recommendations are carried out, not because our recommendations are concretized by laws passed by the Legislature. In other words, any minister in government has the right to reject and refuse the committee's recommendations.

Ms Morrison: I think that is right. I think this committee should be very concerned if that turns out to be what happens at the end of its recommendations. The Ombudsman process, the process whereby the Ombudsman reports to a legislative committee is intended to empower the Ombudsman to ensure that ministries and government agencies cannot do things which the Ombudsman finds to be unreasonable.

The committee has traditionally been the mechanism for ensuring that when the Ombudsman has done an impartial investigation--and the Ombudsman has no particular reason to recommend something, except that he finds it unreasonable that the minister is behaving a certain way--this committee has been established and has been very successful in giving weight to the Ombudsman's recommendations and in making them a matter that ministers consider very seriously.

I think if it happens, and it just has not happened, but if it starts to happen, that ministries can come to this committee and say, "We do not feel like doing that" and this committee says, "Oh, well, fine, sorry we asked,"

then the process will become a meaningless process. Ministries early on in our investigations will say: "Why should we bother too much with responding to the Ombudsman's investigation? When it gets to the end, if they find that we are doing something unreasonable, we can just say, 'Well, too bad, we do not feel like doing what you said.'"

If the process is to mean anything at all, it has to have at the end of it some basis upon which a ministry is responsible for implementing an Ombudsman's recommendation. If there is no responsibility on a ministry to do that, then the process is going to be very threatened.

This committee has lots of time to say: "We do not agree with the Ombudsman's recommendation. The ministry does not have to do that." That is one thing. That is an understood part of the process, and part of the reason for presenting cases to you is to provide you with the opportunity to say whether you support the Ombudsman or you do not.

But in the case that the committee supports the Ombudsman, then it becomes very important that that is not a meaningless support and that the ministry cannot just turn around and say to the committee, "We don't care what you say, Mr Lupusella."

Mr Lupusella: I do not want to reiterate what I said, but we are not here to pass legislation as a result of our recommendations and the ministries within the principle of the law have a discretion either to follow our recommendations or to reject the recommendations. There is no principle within the present statutes that forces ministries to follow the committee's recommendation. That is the reality of the situation.

Mr Cousens: Mr Dombek, in your opening statement, in the second or third paragraph, as I heard you say it, you said, "In many cases, we are pleased to work with the Ombudsman." Why would you say "many cases"? I thought that there would be a sense, from your ministry, that in every case you would be interested in working with the Ombudsman's office.

Mr Dombek: If I said "many," that was perhaps just a slip. I would say that, in my experience, in the 12 years that I have been in the government as a director of a legal branch for various ministries, I can only think of maybe one or two situations where there was some fundamental disagreement with the position taken by the Ombudsman.

Mr Cousens: I think you will find, if you go back to the Hansard, that what you said initially prejudiced me against some of your remarks after that. I picked up that it was not in every case that there is a sense of urgency and importance attached to the Ombudsman's office. I am please that that was not the intention that you had.

Mr Dombek: No, it certainly was not. I would say, in the vast majority, even since this case, we have had some dealings with the Ombudsman's staff and we have resolved those matters very quickly. As a matter of fact, some of them depended upon a legal opinion, an interpretation that my branch did provide and we changed the course of what somebody was doing. I am sorry if I misled you that way.

Mr Cousens: No, I would not use such strong words, but I—

Mr Dombek: I guess that is unparliamentary.

Mr Cousens: I felt that it showed a certain lack of caring about the

sense of responsibility that we have for our job. That is tabled and I am glad you clarified it.

Mr Dombek: If I can say one other thing, this ministry co-operated quite a bit in this particular case, to the point where we provided the name of an expert animal geneticist to the Ombudsman, so that the people there could contact him and get an opinion on it.

Mr Cousens: Fine, we are aware of that.

Madam Chairman, my next point has to do with your office in its determination of the feeling that it is not appropriate that this section be considered by the Ombudsman and taken further. In general, may I just say that that kind of conclusion drawn from the ministry along the line of thinking that has been presented by Mr Philip, and also I think what Mr Lupusella is really after, is really not satisfactory to me as a committee member, because either the Ombudsman Act is going to be followed to its fullest or we are going to change it. If a ministry or anyone else around wants to propose amendments to it, there are many ways in which that can be done.

As far as I am concerned, the Ombudsman Act is pretty clear on how this one should be held, so that it is going to be under the Ombudsman Act. I just want you to know that, sure, there are problems with the act and the legislation, but that should not interfere with the due process under that act. On the basis of that, I would suggest that if there are recommendations that your ministry or others have to make on amendments to the Ombudsman Act, that you make them and deal separately with the situation under which you are acting. That is the way I am going to be voting when we come to a vote on it.

Based on that, knowing that we are going to be working within the act, I am looking for a way in which there can be some resolution of this and a method by which there can be some mediation or, if it is through the courts, I ask the question--I think the motion of the committee is so open-ended that you could draw the conclusion that the courts were a possibility. I think that is unfortunate, because I do not think that was necessarily the intent of the committee. If it did go to the courts, would you be prepared to pay for the costs of the defendant on that?

Mr Dombek: I really do not have any instructions. That was not an issue that was discussed with the minister. Certainly, if we were to be found liable, the costs usually follow the event.

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Mr Cousens: I understand. I am just saying that if we are going to go that route, I am certainly not in favour of it at this point. If we are to follow the Ombudsman Act and if you then wanted to go outside of that and cover the costs of the plaintiff, I would be at least willing to look at it. Inasmuch as you do not have that as a proposal, I will ask you if there are any other proposals you have in your hip pocket as to how we could meet the needs of Farm Q Ltd if the courts are not going to be followed?

Mr Dombek: Are you asking me, Mr Cousens?

Mr Cousens: Yes.

Mr Dombek: We presented all the options to ministry officials and to the minister and we canvassed the idea of rent-a-judge, which is really

arbitration when you come down to it. We looked at the option of going to court; we looked at the option of mediation and maybe one or two others. When it came right down to it, we felt that there really was not any option.

Part of the difficulty about the costs and so on in the arbitration is that we feel that it would be just as costly to both or either party to go to arbitration. The concept of rent-a-judge is not cheap. It is usually some very high-priced lawyers or perhaps some retired Supreme Court judges who are doing it. There is the cost of transcripts and things like that. You basically are going to get into the same kind of situation as you would with a court of law. If the question is, do I have anything that I could whip out and say, "We have a solution here," then I guess the answer is "I am sorry but I don't."

Mr Carrothers: Maybe I should preface my remarks by saying in response to Mr Cousens that, as someone who has voted on that resolution, in my mind, the possibility of the court was certainly there. I can only speak from my own thinking, but in terms of that wording it was certainly within the purview of that. That was part of the reason my vote was cast the way it was.

I wonder if I could ask the Ombudsman one thing, since we are talking about precedent-setting and all that sort of thing. Have you ever had a situation where the committee made a recommendation such as the one in this case, which was essentially that this is not the appropriate place to decide the issues? Is that the only time that has happened or have there been other times when that has happened?

Ms Morrison: My historical memory only goes back to 1982, but the Pickering matter was referred to hearings for determination of the damages. On a number of occasions this committee has recommended that an application be made to a court in order to enable a tribunal or a body which would otherwise be functus to implement the recommendation of the committee. I do not recall a situation in which the committee has said exactly what was said in this case. We have had very complex cases before this committee, as you know. The Argosy case of 1981 was an example of that.

Mr Carrothers: In some ways we are striking out into new territory based upon what we have already decided. You mentioned the Pickering and the Argosy cases. My reaction to them when they happened was that they had elements of class action around them, except we do not have terribly good class action law, or at least did not at that time. Maybe we do not yet, in terms of allowing access to the courts for multiple individuals. I do not know, not being on the committee at that time, whether that had any impact on how it dealt with it but, of course, those elements are not in this one.

Since it seems that ultimately we are talking about process here, I wonder if we could go through the elements that you think are essential. In saying that you feel this has to go to the courts, obviously you are saying that the elements of that process are essential, in your view, to resolving this; that you would want to see that happen in order to resolve this. I am wondering if we could examine them.

Discovery, for instance: You even mentioned expediting that. You obviously feel that a discovery process is essential here. Is that what you are saying?

Mr Dombek: Yes. Perhaps Mr Marshall could answer that. Mr Marshall runs the branch in the Attorney General's ministry that is responsible for the vast majority of litigation and also for giving legal opinions to ministries

on particular issues. I guess the prime function would be to serve in both alternative dispute resolution mechanisms and through the courts.

Mr Marshall: Let me approach the beginning of a response to the questions posed in this way, by telling you what I was asked by the Ministry of Agriculture and Food to do. That was simply taking the language of the resolution of this committee that Mr Dombek has referred to on two occasions. I was asked what, in my opinion, would be the most appropriate process for resolving the disputes that appear to be manifest in the exchange of correspondence between the ministry and the Ombudsman's office.

I undertook that role really with two principles in mind. They are not reflected in the letter in June that you have before you.

The first principle was that it is my view that it is the function of the Ombudsman to facilitate the resolution of complaints; that the Ombudsman has an independent, objective responsibility to see that complaints made to the Ombudsman's office are dealt with in a manner that has the greatest credibility with those people who are involved in the process, both the ministry and the complainant; that it is not the role of the Ombudsman primarily to be an adversary to any government organization or to be an advocate or a legal representative for the complainant, but that, in a co-ordinated, co-operative way, all the parties involved should facilitate a resolution of the matter. My view was that the Ombudsman had an independent role, that is, a role independent of the complainant, and shared an interest with the ministry in a most effective resolution of the disputes.

The second principle that I bore in mind in providing the advice to the ministry was that whatever process was developed should be a legitimate one, legitimate in the sense that there was the highest prospect of a satisfactory resolution that could be bought into by both the complainant and the ministry, not a process that would lead to dissatisfaction with the result, a feeling that some undue pressure had been imposed, that there was a compulsion to arrive at a result that could not be justified in any responsible way by those who are responsible for the management of public funds.

I thought those two principles would not, and I do not see that they do, receive any kind of disagreement from the Ombudsman's office.

Perhaps not a principle but a related matter, and it is an aspect of legitimacy, is that whatever the result was, what was being sought to be established was a precedent that would have sufficient weight and credibility that it could be safely relied upon by responsible members of the Ministry of Agriculture and Food to allow for the resolution of other cases.

With that background in mind, and it is based on some 20 years of experience dealing with the resolution of matters in various forums, or fora, using the various techniques of dispute resolution--mediation, conciliation, arbitration or court proceedings--it was my opinion, as expressed in the letter, that based on the apparent lack of any clearly defined understanding on any issue, arbitration was inappropriate as a means of resolving this kind of dispute.

My experience in the past has been that dealing with single, concrete issues that can be clearly articulated without heavy reliance on pretrial proceedings, examinations for discovery, exchange of documents and so on was not appropriate to this kind of issue. This case is a complicated one. It is a technical case. It is not unlike much of the significant litigation that is

conducted every day in the courts, and if it is resolved by the courts, it has the chance of meeting those criteria that I mentioned.

Courts have an aura of authority about them, an authority that can hardly be quibbled with. It is my opinion that boards of arbitration, individual mediators and so on, these less formal procedures, do not have that kind of authority.

I think the reasons that are set out in the letter are full and complete. They deal essentially with a process that allows for the fullest exposure of the issues involved and in a fair and just way provides an opportunity to both the parties—that is, the complainant and the ministry; I say both the parties because the Ombudsman, of course, in a legal proceeding would have no part to play—to fully articulate the positions they choose to take.

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Mr Dombek has said that to a very considerable extent the procedures can be scoped; that is, we can shorten the process in terms of the consumption of time. Members of the standing committee on the Ombudsman will understand that to a considerable extent the progress of a case through the courts depends on the co-operation of the parties to the lawsuit to get the matter concluded. It is not because of court backlogs entirely that civil action takes a very long time to come to trial. If one is worried about the backlog in Toronto, the proceedings could be commenced in the area where the complainant resides. The lists are shorter in that area, as I understand it.

Discoveries could be held expeditiously, documents exchanged and the matter prepared for trial very quickly and at an expense, I might add, that is probably less than trying to construct an arbitration process that provides all the various protections that a court provides without the guarantee that you would have the authority in the result that you would have from a court judgement. Arbitrations are not cheap. You pay for the judge; for the space that you use where the proceedings are undertaken; for transcripts in an amount that may well be more than would be the case in a court, because special arrangements have to be made to ensure that you have the presence of a certified court reporter. You pay for probably more than one judge, I suppose; there has been no discussion about that, but a panel of three perhaps might deal with these issues.

I know of no arbitration that has been established to deal with the range of issues that present themselves in this case, a case that in no way differs, except in its complexity, from the ordinary sort of matter that is bestowed on the courts. There is no real analogy between the issues presented here and the kinds of things that are mediated in a relatively informal way, that are arbitrated or that are the subject of conciliation.

What I have sought to point out are those matters that in my view make this case the kind of case most suitable for resolution by the courts and I have set out, I think relatively exhaustively, the basis for my opinion. I might add that I see little basis for any other process. That is, if I were to be asked, "What is in favour of the other kind of process?" I am at something of a loss to give you something that is very significant in that regard.

That is the background. That is what I was asked to do. Again, I thought the process had to have a legitimacy to it. Some regard had to be had for a process that would give both the Ombudsman's office and the Minister of

Agriculture and Food (Mr Riddell) the satisfaction that this kind of matter had been dealt with in the most effective manner and not in a less formal, unsatisfactory way.

Mr Carrothers: What I am drawing out of that is, is it fair to say that in your view, because of the necessity for some pretty extensive pre-trial proceedings and discoveries to let everybody get a chance to see the facts on both sides and see if any issues can be clarified, and the fact that, certainly in my view anyway, this is going to tend to be, for want of a better phrase, a battle of the experts, you are not seeing any particular shortcut or cost saving that would be accomplished by using a process other than the court? Is that really what you are saying here?

Mr Marshall: That is correct, yes. The same kind of detailed examination of the issues would have to be undertaken in a pre-hearing or pre-trial manner no matter what process was developed. Of course, as you know, there is always the prospect of a resolution to the matter arising out of the revelation of the background information as it goes on. It does happen from time to time. Lawyers do settle cases.

Mr Carrothers: One would hope, yes. You also mentioned the possibility of precedents, both ways of course, on this.

Mr Marshall: My understanding is that is a significant aspect of this case.

Mr Carrothers: Mrs Meslin, I wonder if you have any comments on it.

Mrs Meslin: The primary comment I want to make—and I thank Mr Marshall for making the argument so clearly about courts—is that this is an argument we hear in relatively every case that comes to the Ombudsman, when it has some complexity, in relation to whether the Ombudsman should be dealing with it. Ministries have always said and continue to say: "We see no reason why the Ombudsman should involve himself or herself in this. This is a matter of some complexity. The place to outline it and to clarify it is the courts." We are obliged to say that it does not matter what we think about it: the complainant has an option and has chosen the Ombudsman's option.

In addition, when we talk about the courts in relation to this case and talk about the discovery procedure, which is laying before the court all of the documentation, the experts, etc, I might equally say that the courts are no more capable than is this committee—which has had the documents laid out before it and could, if need be, decide to continue on and hear the matter as to compensation, if any—because when we talk about discovery, this committee has literally had discovery to a certain extent, where everything has been laid out.

Mr Carrothers: I think you are drawing a conclusion the committee did not draw itself.

Mrs Meslin: That may well be, but my difficulty—

Mr Carrothers: What we are looking at here, surely, is the process and that is what I am certainly getting at. I think, with respect, you are drifting here. In my mind, anyway, I am trying to see what would be the best process. The committee has decided that it feels an adversarial process should be used to determine this. That was our decision.

Mrs Meslin: Yes.

Mr Carrothers: Moving on from that, the question now is what process? I guess the point that was made here by the ministry is that, because of the complexities and its feeling—and presumably yours—of need to get at the facts within each party's case, discovery would have to go on and by the time you get through that it is costing as much or taking as much time in that process outside the court as in using the court. Do you have any comment on that?

Mrs Meslin: My comment has to be that we must consider who will bear the cost because in the original choice of the complainant, as Gail said, one of the major problems it had was that it felt it could not afford the court process. We are thinking now about going back to the court process again once more and I am concerned about bearing the cost.

Mr Carrothers: Surely one of the issues this committee can get at is its recommendation on those costs. I am talking about the process here. The suggestion has been made that in fact the process outside the court, once it is constructed to deal with the issues that I think are important to the ministry—I guess I am indicating that I see some merit in having a discovery here—by the time you are through you have spent more than using the courts.

If we deal only with that question of cost, I am wondering if you have a comment on whether the courts would be any costlier than using a process of rent-a-judge with discoveries or whether you think it would be an equal cost or less. Do you have a comment on that?

Mrs Meslin: I am really not prepared to say. We did investigate the costs of rent-a-judge and our understanding was that they are quite expensive. I cannot make the comparison about whether they are more or less expensive. What I do know, though, about rent-a-judge is that the primary reason for doing so is to expedite it. I think you know about that.

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Mr Carrothers: When I have experienced that, it has usually been in the context of, "We got one issue inside and let's go for it outside the court." It seems to me the job we have to decide here is a process, and the second decision is about the cost. I guess that is why I am separating them in my mind and wanting to get in my mind what I think is the best process and then the second issue is how those costs are going to be dealt with. That is certainly how I am thinking.

Ms Morrison: It is very difficult for the Ombudsman to comment on the appropriateness of the process without that decision of costs having been made. If we were here talking about going back to court with the ministry agreeing to bear the costs of the court process, then I think the Ombudsman's comments might be very different, because you then might be saying, "This committee has decided that, at the ministry's expense, this mechanism should be used to determine the damages." That is a quite different thing.

If we are saying, as I understood from my conversations with Mr Dombek, the ministry is not prepared or has not yet been prepared to say that it is interested in covering the costs, that is a very different matter. To send the complainant back to where he would have been had he never come to our office at all, to be at risk of bearing the court costs, which he would have been in the first place, makes this whole process completely useless.

Mr Carrothers: As I am saying, I think this is what we have to decide: the question of costs. It seems to me it is the question of the process and the question of how those costs are going to be paid, and that is all on the table here. We have heard the ministry suggest something, but this committee actually decides it.

I guess I am just going on from our decision on this originally, which was basically that we felt there should be an adversarial process to decide this. Speaking as someone who was there, we obviously decided we could not and we felt there should be a process. We sent it out to see if a process could be agreed to. I guess it has not, so we are back here deciding the process. The point of my question here is what would be the best process, and of course implicit in that or at least in addition to that is how then are the costs of that going to be dealt with.

I am just trying to determine in my mind whether the courts are the cheapest process. They may in fact be, so then it comes to the question of who is going to pay the costs. I think that is all I have for now.

The Chairman: Mr Philip had a supplementary on the costs.

Mr Philip: I want to ask the Ombudsman: In your opinion, is it just a matter of costs? When you look at your act, subsection 19(3) or go over and look at clause 22(1)(b), what you essentially have is an attempt to set up a system which is more flexible and allows more discretion in decision-making.

My question to you is this: If the decision of the committee is to send it to a tribunal of some sort, would a tribunal not be expected to exercise the same kind of discretion that the Ombudsman would, rather than the judicial manner of strictly the legality of the case rather than the merits of the case? What I am saying is that if the arbitrator is a judge, would that not be less in keeping with your act than another form of arbitration system which would have more flexibility in judging on the merits of the case rather than strictly the legality of the case?

Mrs Meslin: If you are asking us whether tribunals per se, mediative or arbitrative tribunals, have wider discretion, I would have to say yes. Of course, they are different, they have different purposes than the purposes of a court.

I think what Mr Carrothers was asking earlier was, given all of the options, what would be least expensive, even forgetting who pays. I do not know that particularly, but certainly a tribunal has broader scope than a court.

Mr Philip: I think my question was more specific than that. It seems to me that this committee has as its first responsibility to uphold the act, and the act gives you discretion. My question is, would a tribunal not be more in keeping with the general thrust of this act, which Mr Lawlor and the others on that committee established, than a court would be in keeping with the general thrust of your act?

Mrs Meslin: In my view, yes. I agree.

Mr Philip: Mr Carrothers looks puzzled and I am wondering—

Mr Carrothers: I am not sure if I understood the point.

Mr Lupusella: Me too; I did not understand which tribunal would handle—

Interjections.

The Chairman: I think we should go back to wondering whether that was a supplementary.

Mr Carrothers: I would have thought the questions of onus of proof and proponents of proof would be pretty much identical in a tribunal or in a civil trial. Is that the—

Mr Philip: What I am suggesting, Mr Carrothers, is that when this act was set up, the purpose of the people who set it up, of the committee, of the Legislature, if you look at sections 19 and 22—

Mr Carrothers: I forgot to bring my act with me.

Mr Philip: I will give it to you—was to set up a less formal, less legalistic system. Therefore, the recommendation to send it back to a court is not in keeping with the spirit that those legislators who initiated the Office of the Ombudsman had in mind, but a tribunal would be more analogous to the spirit of the Office of the Ombudsman and to the spirit of the act.

Mr Carrothers: We may want to have a debate later. I am not sure it is not open to the committee, since we have already decided there should be some adversarial process—we are bound and determined to have some process outside of court, I guess, but we are getting into the debate that we should perhaps have later.

The Chairman: Are you finished with your supplementary on this, Mr Philip?

Mr Philip: That is my supplementary. I am on the list, I am sure, to ask some questions.

The Chairman: You are. I have a couple of questions. I guess my first one is that Ms Morrison indicated the ministry was not prepared to settle this case at this point. I missed the point of what it was you were trying to—I assume that is true, that the ministry is not prepared to settle this; not the process, settle the case. I did not understand the point.

Mrs Meslin: Let me answer that because, as I have pointed out to the chair, I had some discussions with the deputy minister prior to today and mentioned settlement to her in the course of discussions. When she got back to me advising me that Mr Dombek would be sending us the letter, and the contents of it, she said: "We have decided that a settlement would not be acceptable. We are not prepared at this time to look at a settlement." That is just the conversation between the deputy and myself.

Mr Dombek: I think it is important to add at this time that one has to remember there have been extensive documents given to this committee, but they have all been documents given to this committee from the ministry. Those were the ministry's documents. There have been allegations of substantial losses, none of which have been proved and so on.

Of course that is a completely different issue. If I might make a very brief comment, to get back to the idea of cost, there are just two points. I

have never heard that the complainant cannot afford to at least start a court action. Quite simply, if the ministry is found liable for the costs of all the event, we would be prepared to pay the complainant's costs at that time. I suppose as an alternative to the Ombudsman's suggesting that the ministry bear the costs of the complainant, perhaps the money should best come from the Ombudsman's budget.

Interjections.

The Chairman: That is a possibility. I think this is something we can discuss.

Mr Cousens, that was going to be my question, so let me ask.

Mr Cousens: If you would heat up the room, I would not have to keep chattering with you.

Mr Carrothers: We appreciate your attempt to raise the temperature.

The Chairman: My second question is perhaps to Mr Marshall. Just generally, the Ministry of the Attorney General's position does sometimes include mediation, alternative mechanisms of dispute. Would you say that you always suggest, or in a majority of cases you are open to the suggestion, that mediation is an alternative or that there are alternative dispute mechanisms besides those afforded by the court system? Would you say that?

Mr Marshall: There is a place for mediation, conciliation or any of the other alternative dispute resolution mechanisms that one might contemplate that actually exist or that one might try to construct.

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The Chairman: But do you ever consider those alternatives?

Mr Marshall: I was going to say that they are considered where it is thought there might be some practical result from utilizing them. Usually, in situations where there is a remaining stumbling block, for example, negotiations have reached a point where there is agreement on a number of relevant issues. In the context of the negotiation, it is a matter of unlocking, so to speak, positional bargaining.

Certainly, in the past we have utilized various mechanisms; getting a third opinion from outside, for example, from somebody who is an expert in the field, where there is a difference of opinion about some matter and the people are so locked into their positions that there is just no movement. When you have to get movement in a negotiation context, that is done.

The Chairman: So you have considered alternative dispute mechanisms.

Mr Marshall: Yes.

The Chairman: And this is an instance where you have come to the conclusion that the court system is the appropriate one.

Mr Marshall: Yes.

The Chairman: That is the more important part. Shall I assume that the Limitations Act has not been violated in this case?

Mr Marshall: My understanding is that the limitations period has not expired.

The Chairman: That is great. They have changed them and I have long since lost sight of how many years any cases have. As I recollect, when we came to this recommendation, we used the term "some adversarial process." I recollect as well that the court system was included in that process and that the discovery mechanism before the court process is one that we thought was important, or before any alternative dispute resolution mechanism, but more important, if there had been an alternative, if we had gone to the rent-a-judge or to the arbitration process, mediation or any of those, where would the cost have lain?

What I see now is that we are discussing what mechanism should be used, what process, and then second, costs. I think Mr Carrothers has pointed that out. But where would the cost have been had you been able to come to some agreement on the process as we indicated? That would have been an agreement at whatever level, if it had been court mediation, rent-a-judge or whatever process.

Mrs Meslin: We would have taken the position that the ministry pay.

The Chairman: That is very helpful. Is there anything in your budget or would there be an avenue to provide financing in your budget, or moneys in your estimates that would provide for the paying of costs associated with financing?

Mrs Meslin: Absolutely not. I do not think we could do it, first of all. Second of all, the precedent that might be set were we ordered to do it would mean that at the very first instance someone brings us something, it would be as I said. A ministry says, "Why do you not go to court?" We would say, "Sure, we will pay." But I do not believe we can do that.

The Chairman: Even with the order or the recommendation by the committee?

Mr Carrothers: If I could follow up on that, I would like to ask the committee to determine that might be the way to go. What would stop--

Mrs Meslin: I do not think we have legislative authority to do it.

Ms Morrison: When a complainant like this comes through our door, it would be much cheaper for us to write to the ministry and say, "We have this complaint." The ministry writes back and says, "The complainant should go to court," and we would say, "Okay, we will pay." It would save us a lot of investigators' time. It would save all of you people time. It would be a much more expeditious process if we just paid outright. That is not what the Ombudsman is for. The Ombudsman is not there to pay people who have complaints against the government or to pay for their court actions. That is not what it is.

Mr Carrothers: Our decision here, as you have indicated, is that this is the first time this has happened. We have to start with the premise

that we are in a peculiar case here and that this is not the norm for what you do.

Ms Morrison: Unfortunately, I have to say this is not such a peculiar case.

Mr Carrothers: Then it is your decision that was peculiar.

Ms Morrison: This committee, in years past, has taken upon itself the responsibility of deciding very complicated matters. Those people who have been on this committee for a long time have never thought they were not smart enough or good enough to make decisions that were hard decisions. When this committee makes a decision whether to support or not to support the Ombudsman, this problem does not arise. What has happened here is that this committee has said, "This question is too hard for us to decide." Should that then throw it back to the complainant to have to begin to pay all over again?

Mr Carrothers: I have probably grabbed your supplementary, but let me just say I am not sure we said it was too hard for us to decide. Certainly, in my own view, we did not have the information in front of us to decide.

The Chairman: Yes, I think I agree with Mr Carrothers. It was not that we decided we could not decide. We have decided on the reliance, but we did not have put before us, as I understand the agreement of the parties, and perhaps our counsel, the amount of damages. That is what the recommendation was about.

Mrs Meslin: Might I just ask a question, though, for my clarification. I can understand the committee saying it did not have enough information before it to make a decision, but is it not within its power to ask the parties to supply that information in order for it to make the decision when it has gone that much further? I can understand them not being able to make it with what they had because we all agreed we did not give you any. We did not say we were not prepared to go further if the committee had so instructed us.

Mr Carrothers: I was butting in, Madam Chairman, and I apologize.

The Chairman: That is all right. I have Mr Philip, Mr Bossy and Mr Cousens. Can we focus again on—

Mr Philip: Mr Bossy has not had an opportunity to ask questions, so why not allow him to go ahead of me?

The Chairman: Go ahead, Mr Vice-Chairman.

Mr Bossy: Thank you very much. We regurgitated a little bit of what has transpired and all we really accomplished this morning was that we have heard again from the Ombudsman and the ministry that they cannot get along in coming to a settlement. So it is back in our laps. Let's be fair. The final conclusion says, "If they are unable to agree, the committee will reconvene and decide the process after hearing submissions from the two parties."

I think we are at the stage where we must now come back and make a decision. If we do not want to send it to the courts, then we must make a decision on whether we pay or we do not. That is the final decision that I see we should be making; that is, the question of paying, whether we pay for courts or we pay for the recommendation of the Ombudsman's office, which was

to go ahead and pay a fair amount of money. It is $417,500. Where that figure came from that was expressed here—someone put these figures together and hoped that this was put together on factual information.

We are talking about a very highly technical problem we have here. We are being asked to be able to resolve it just by having a figure thrown at us here, which we never were able to get into. How we would ever get into it is the question, because to be able to resolve it you would need to know what values you put on all the different elements that contributed to this case.

I have another point. Perhaps I should have made it first. I do not recall that we had evidence of the complainant going through another process of trying to get remuneration for the problem that was caused at his or her place. That is something I do not recall, whether he or she used the Ombudsman's office immediately because of nonavailability of funds. The record of the Ombudsman's office is very well known. When the Ombudsman's office goes to the end, generally it gets its way.

I can imagine the pressures the Ombudsman's office can bring on the ministries. That is good; I agree with that. At the same time, we are looking at a technical case that was not approached in any other way I know of to try to resolve it. Was the ministry approached for a settlement in some other form, such as an adversarial way or the threat of an adversarial way? Did this complainant go directly to the Ombudsman and the Ombudsman carried this all the way through to the position we find ourselves in now, trying to resolve what is really a financial matter? Any way you cut it, the bottom line is dollars.

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So our duty now as a committee, and we have made decisions here, is to go this route. Our credibility is at stake here if we do not follow up, because we discussed this very extensively and we came to the conclusion that we would ask the Ombudsman's office and the ministry to get together once more to see if they could resolve it. If not, then we must put the hammer down on this case, one way or another. This is what we owe to the complainant and what we owe to the credibility of our committee.

I have some difficulty accepting that we should recommend the adversarial way because of the fact that the complainant has that option by himself. We should not have to recommend that. We should have made a decision of yes, we do or no, we do not. Then the complainant would have known where he stood and could have taken the proper route. If he wants to go through the courts, there are all kinds of lawyers available to the complainant.

So now, I think we should go to that last line in our recommendation, and that is to proceed to see whether we can agree upon a process. That is my statement and those are my conclusions of what I have heard. All I know is that if there does not seem to be a chance for the ministry and the Ombudsman's office to come to some agreement, we must close the books from our position. That does not mean it is a final position for the complainant, because the complainant has alternative routes to take.

The Chairman: Thank you. I have two more people, and then I think we should go in camera and make a decision on this matter, if possible, for today. I have Mr Philip and Mr Cousens.

Mr Philip: I think Mr Bossy is right. What we are faced with is whether or not we want to exercise our rights as a committee. Is it not fair to say then that while we have, by tradition but not by act, never called complainants before us, we could if we wished, in a very complicated case, call the complainant before us, after hearing the evidence presented by the Ombudsman and examining all the documents that may be obtainable, sworn under oath under the Evidence Act? We could, as a tribunal, as a court—and the Legislature is the highest court in the land—in fact ask questions of the complainant, the ministry and the Ombudsman and come to a decision.

It may well be that if we decide that there is some merit in the complainant's case, we might then want to refer, as we have done in the past, to actuarial people or accountants to decide or to arbitrate the exact amount of compensation, but there is nothing that would prevent this committee from making the decision, since there is an impasse now between the Ministry of Agriculture and Food and the Ombudsman. I will ask the Ombudsman that question. Mrs Meslin, would you comment?

Mrs Meslin: I think that this committee sets its procedures; it is for the committee to determine. I would just caution that if you should decide to do it by asking a complainant or any other party to come before you, you are going to set a precedent for the future. It is the only caution I make.

Mr Philip: It was a precedent that I argued against when Mr Shymko—I think it was Mr Shymko—wanted somebody to appear, and we agreed that he would appear before a subcommittee. That can be handled later down the road. We might decide that we need to ask some questions.

At the present time, though, this committee can ask for additional information from the Ministry of Agriculture and Food and from the Ombudsman and make a decision based on that additional information which would be needed. We do not have to send this to anybody other than ourselves. We can make that decision.

We may want to seek advice of agricultural experts and call them as witnesses for our own information, independent people who are not connected with either party. As we have done in the past, we may want to seek advice of insurance or actuarial people to come up with figures.

My one question to the Attorney General's office is this. Mr Marshall, one of the traditions of this committee is that we do not accept new evidence. I am just asking you the question. In item (b), where you say that there a number of other explanations for the alleged damages that have nothing to do with the ministry, you are not suggesting that you did not present those to the Ombudsman and that that was not part of the evidence that the Ombudsman had before her when she made that—

Mr Marshall: I am not suggesting there that there is some unrevealed source of factual data that will be crucial in determining the matter that has not in some form or other been presented to the Ombudsman.

Mr Philip: So the Ombudsman had that information that you are referring to. You are not saying that there is whole lot of new information that, if the Ombudsman and the committee had it, we would make a different decision?

Mr Marshall: I am not suggesting that there is additional information. What is partly inherent in that is that of course the ministry

has not, I think, had the opportunity to examine any of the complainants documents. There has been no general examination of those matters, but in broad terms, the Ombudsman has been advised by the ministry of the other possibilities that appear to exist as explanations for what happened.

Mr Philip: If this committee were to conduct further hearings on these, we would have access to those documents and therefore you would have access those documents and you would be able to satisfy your need to cross-examine not the original complainant but at least his representative in this case that the Ombudsman was finding in his favour?

Mr Marshall: I am presuming that whatever this committee would find useful to its deliberations would be those matters that would be equally useful to me and I am presuming that it follows—

Mr Philip: So it would satisfy your same concern of a court of law?

Mr Marshall: As I think I indicated, it may be possible to construct a court-like kind of environment, and if there were no restrictions imposed on the process that would prevent a full and fair examination of the issues, then I suspect that the answer to your question is yes. It is difficult, when I am asked that question and I do not have the details of just exactly what process would be used and how it would be established, to answer the question. I am afraid I will have to decline to say whether I would be in favour of that or not due to the lack of precise information about just how it would be organized.

Mr Philip: You do not seem terribly adamant against it. I am trying to come up with a solution that will satisfy both you and the Ombudsman, and obviously, the court does not satisfy a number of members of the committee and it does not satisfy the Ombudsman. What I am asking you is, what is your tradeoff? Would you be comfortable with this committee having more extensive hearings on this and then making a decision?

Mr Marshall: There would be a number of issues that would have to be considered. As I have mentioned, one would be that I have difficulty at the moment envisioning exactly how a committee such as this would organize itself in such a way as to provide the kinds of procedures that would give the kind of, shall I say, satisfactory result potential that I have described. It may be possible.

Second, I think it is in some respects an awesome kind of task for any committee to undertake and there are some very considerable difficulties that would have to be discussed in terms of any particular procedure. It may be possible.

I guess, not having had experience in this particular kind of process because I know of no precedent that I have been involved in, I am simply hesitant to express any opinion at all on the matter, at this stage at least.

The Chairman: I just want to get some direction from the committee at this point. We will have to go in camera for this decision, and as it is 12 minutes to 12, I wonder whether the members of the committee think a decision could be reached by 12 o'clock or if they we would rather hold over in camera discussions until next week when we meet.

Mr Carrothers: Is it possible to start and see—

Mr Philip: Why don't we kind of just get a feel for where the members are. Some of the members who were at the original hearings of this are not here because of other committee duties and other members are here, and I think they should be canvassed as well.

The Chairman: The concern I have is that two committee members have indicated they have to leave now or within the next five minutes.

Mr Philip: If Mr Cousens is leaving, then I think we should adjourn.

Mr Cousens: I will wait for a few minutes if we can come to a decision.

Mr Bossy: I suggest that we adjourn and reconvene next Wednesday in camera so that we will have ample time to go over all the details.

The Chairman: I do not have a consensus on this. One suggestion made is that we go in camera for approximately five or 10 minutes just to get a feel for where people are coming from, with possibly no decision being made. The alternative is making no discussion now in camera and coming back next Wednesday morning. That is your suggestion, Mr Bossy.

Mr Philip: Let's try for five minutes just to see where we are going.

The Chairman: Would you be prepared for five to 10 minutes now?

Mr Philip: We will not make any final decision, but at least let's—

Mr Cousens: As long as we make no final decision.

The Chairman: Then you have your answer. There will be no final decision today, for the record. We will go in camera now and we will reconvene, in camera most probably, next Wednesday at 10 o'clock.

We will get back to you as to whether you should be in attendance next Wednesday for the decision.

Mrs Meslin: May I just ask what is happening then with Mrs H?

The Chairman: That is another matter. The Ministry of Education is prepared to come before us next week. They are preparing a letter which will indicate their position in writing and also saying that they would prefer not to come before the committee if that is sufficient reply.

The Ombudsman has indicated to me that she is unavailable to attend next week due to court proceedings for the office. I would make the suggestion that if the Mrs H/Ministry of Education matter is still coming before the committee, we wait two weeks for that to come before us, when the Ombudsman is able to attend.

I will pass along the letter from the Ministry of Education. Could you make a decision as to whether you feel it necessary for it to come before us? Is that a good suggestion?

Mr Philip: Why not send it to the subcommittee?

The Chairman: Because the subcommittee has six things right now. The

subcommittee can look at it too, but I will say that we will not deal with Mrs H until you as Ombudsman are in a capacity to come before us.

Thank you very much.

Mr Carrothers: Have we forgone any possibility of deciding anything right now?

The Chairman: I do not think so. Mr Cousens has said he will stay. We are in camera.

The committee continued in camera at 1151.

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STANDING COMMITTEE ON THE OMBUDSMAN

CASE OF MR Z
ORGANIZATION
CASE OF FARM Q
CASE OF MRS H

WEDNESDAY 28 JUNE 1989

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Zacks, Michael, General Counsel
Morrison, Gail, Director, Investigations

From the Ministry of Agriculture and Food:
Dombek, Carl F., Director, Legal Services

From the Ministry of Education:
Orlicky, Reva, Policy Adviser, Teachers' Superannuation Unit
Larratt-Smith, Mark, Assistant Deputy Minister, Corporate Planning and Policy Division

LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON THE OMBUDSMAN

Wednesday 28 June 1989

The committee met at 1010 in room 151.

The Chairman: If I could call this meeting to order, this is the standing committee on the Ombudsman. Today we are dealing with two items: the recommendations regarding Farm Q Ltd, and we are dealing with the denied case of Mrs H and the Ministry of Education.

Mrs Meslin: I have a preliminary matter I have to inform the committee about.

CASE OF MR Z
(continued)

Mrs Meslin: We had letters translated and sent out to Mr Z. We have now had them returned. The first one was returned to us. We sent out another letter by registered mail and it has now been returned to us. So we are in your hands. We would be glad to give you the translation in case he contacts the committee, so the clerk could give him our translation if he contacts the committee. We just cannot find him now.

The Chairman: Maybe we can deal with this after we finish. I note that Mr Philip is here. Mrs LeBourdais is not coming and neither is Mr Pollock, and that was a subcommittee recommendation. Maybe we can deal with it, Mr Philip, with the help of the committee.

Do you remember Mr Z? We translated it into Croatian and sent it down to Windsor. Do you remember that case? I think this would be a bit difficult for us. Anyway, apparently he is not at that address any longer and it has been returned twice. That was our only recommendation, that maybe it would help him with the Ombudsman's recommendation if he understood it thoroughly, although he had had it explained as well as could be explained. They had the letter translated and sent it down to Windsor and it has been returned twice, as I understand. What the Ombudsman is suggesting is that we leave that report at the disposal of the clerk in the event that Mr Z contacts the clerk. Sounds reasonable?

Mr Philip: Surely if he does not hear, he is going to contact. It will occur to him that he changed--As long as he is alive, I imagine he will contact.

The Chairman: Does the rest of the committee agree with that? It is a bit difficult, only because it was a subcommittee case, but the committee as a whole approved the actions in that matter. We will just wait until he contacts us, and when he does, we will ensure that he does get a copy of the Ombudsman's report in Croatian. Was it Croatian?

Mrs Meslin: Serbo-Croatian.

Mr Philip: Franco can make a note of that decision. Do you need a mover for that?

The Chairman: I think everybody agrees.

Mr Philip: It is a consensus.

ORGANIZATION

The Chairman: I have two other things before we commence the committee this morning. I am pleased to inform the committee that Eleanor Meslin has had her status as temporary Ombudsman extended until mid-October, so she will be with us at least for that duration.

One of our committee members, Mr Pollock—some may be aware of this, but I was not aware of it—had a heart attack last week. He is in Women's College Hospital. Last week when we called for him and wondered why he had not shown up, they merely told us he was not well. We inferred that perhaps he had a cold. I understand he is doing well. He needs a few more tests and may be at least home by the end of the week.

Mr Philip: Could the committee send some flowers or something?

The Chairman: I was going to suggest that some such action be taken, if that is acceptable. Seeing nobody disagreeing with that action, then we will certainly do that.

Mr Cousens did inform my office that he would be late this morning. Given that there was not an opportunity to find a substitute for Mr Pollock, he asked that we proceed without a PC member in attendance for the time being.

Mr Philip: Mr Charlton has just gone to get a substitution slip which he neglected to bring.

Any further matters before we commence with the agenda?

CASE OF FARM Q LTD
(continued)

The Chairman: We have before us today Carl Dombek, legal counsel for the Ministry of Agriculture and Food.

The committee heard the case of Farm Q and last week met in camera to discuss this thoroughly. We did do that in a very lengthy way and we came forth with a decision which I am prepared to read this morning. The committee has before it our confidential report, but I have just put it before you so you can read as I go along in case you have any comment in that regard. It is on page 3 of the report. It starts as follows:

"The committee was recently advised by the Ombudsman that the parties have been unable to agree on an adversarial process for the determination of this matter.

"After reconvening and hearing submissions from the Ombudsman's office and the Ministry of Agriculture and Food, the committee has decided and so recommends:

"That the adversarial process to determine the issues between the complainant and the Ministry of Agriculture and Food should be the judicial process by the commencement of an action in the Supreme Court of Ontario.

"The complainant's reasonable legal costs, which shall be borne by the Ombudsman unless the Ombudsman considers it unnecessary, such legal costs, if paid, to be included in the Ombudsman's next or subsequent estimates.

"The committee recognizes that the judicial process may be lengthy and therefore further recommends that the parties shall proceed expeditiously in any such action commenced. The committee understands that the Ministry of Agriculture and Food has already agreed to proceed expeditiously in any action commenced."

That is the recommendation of the committee.

I see that Mr Zacks has approached the table. Knowing he is legal counsel for the Ombudsman, without prejudicing the decision of the committee, I wonder whether he did want to make a few comments.

Mr Zacks: The only comment I would like to make is just to advise the committee -we have not done any major research on this point yet -that from my understanding of the Ombudsman Act, I have some difficulty in determining how we have the statutory authority even to make that type of requisition for additional funds.

The Ombudsman's powers are set out clearly in the act. She has only one section that allows her to request to spend funds and it does not include this type of expenditure. It is essentially for payment of staff, for services and for rental of office space. From our point of view, this does not appear to fall properly into that provision, so you have put us in a difficult situation. We do not know how legally we can make that type of requisition for funds.

Mr Bell: Mr Zacks, I would urge you not to make a lot of comments in that regard. Just let me say that I do not have any problem whatsoever with your office, upon estimates approval, etc, undertaking such a responsibility. It has been done, perhaps not in the precise way that has been recommended now; but going back to 1976, it was done. Your office incurred what some might consider to be a considerable expense, referrable to north Pickering, some of which included the immediate payment of legal costs, some but not all of which were reimbursed to you by the Ministry of Housing.

If the issue is whether a third party can fund the legal costs of a complainant, that issue, I would suggest to you, was laid to rest way back in 1976, because the Ombudsman's office was party to that process. I can recall this committee or predecessors of this committee looking at specific estimate amounts of the north Pickering process.

I am not going to put words in Mr Dombek's or the ministry's mouth. I understand from what I know to date that the ministry has no objection whatsoever to that arrangement. If the other side of the proceeding has no objection to that, and it is founded in precedents going back almost to day one, and the committee that receives estimates and approves them says, "Put it on your estimates," I do not see the problem.

Mr Zacks: First, that was a different situation entirely. Those Pickering expenditures were done in the course of investigation. From time to time we hire experts and spend money in our investigations. I see it as an entirely different matter.

1020

This Farm Q situation is a completed investigation. The Ombudsman has issued his report with recommendations. The matter is now before the committee for it to decide how to proceed and it has done so, but comparing this situation to an ongoing investigation is totally different. The Ombudsman certainly has the authority to make whatever necessary expenditures and take whatever procedures are required in an investigation. This is not an investigation, and whether the committee or the ministry thinks it would be appropriate, the Ombudsman still has to decide for herself, exercising her authority and her responsibility, whether this is an appropriate thing to undertake.

Mr Bell: Again, Mr Zacks, I urge you not to make the case for the other side. I do not think that is going to serve anybody very well.

Mr Zacks: We are making the case for our own side.

Mr Bell: I would have thought that with the support of this committee the process and the circumstances for legal costs, as proposed, would be something your office would readily accept without a concern as to whether on somebody's specific or technical reading of legislation it can be done. Everybody is saying: "Go and do it." So what is the problem?

Mr Zacks: The problem is that the Ombudsman has to be responsible for administering the act the way she thinks is appropriate. We have gone on record when we were here previously that we would disagree with this procedure for numerous reasons. It is philosophically inconsistent and detrimental to the Ombudsman's process, the way we have been operating for 14 years. To commit us to pay money on behalf of the complainant, in essence to resolve a complaint contrary to a recommendation that was made, is totally inconsistent with the Ombudsman's role. It puts the Ombudsman in a very difficult situation and it establishes a very dangerous precedent for the future of the Office of the Ombudsman.

Mr Bell: I am sorry. I do not see the dangerous precedent, but I do not invite you to expand.

Mr Zacks: Those are the comments I have. Whether you invite me or not, the fact is that there is no statutory authority in the Ombudsman Act for this type of expenditure. It is totally contradictory to the way the Ombudsman is intended to operate.

Mr Bell: Just so we are clear, are you telling this committee that you will not implement that recommendation?

Mr Zacks: No, I am just giving you our comments. I do not know whether the Ombudsman will require some time to decide what her position is going to be and whether she will be in a position to make that type of statement today.

The Chairman: Would you like a little time to—

Mrs Meslin: For myself, what I would like to say is that, as I am sure the committee is aware, in our wildest expectations we did not assume that this might be the outcome. We certainly looked at the possibility of court. To that end, I think we have to ask the committee for a week in which to sit down and look at it, not only from the legal point of view but also

from a procedural point of view. We are, of course, in the hands of the committee, and I realize it. I just would ask the committee's indulgence so we can present a lucid position.

The Chairman: That is what I think Mr. Bell was trying to caution Mr Zacks on. Perhaps the committee would be agreeable to a little of time for -

Mr Philip: As the Ombudsman is saying there may be reasons why this recommendation cannot be implemented, what if we stand down the recommendation and give them an opportunity to consider what we have suggested and make further representation to us on it, as well as to the ministry?

The Chairman: We have not had an opportunity to hear from the ministry. Perhaps Mr Dombek could share some comments with us, if he has any, on the recommendations.

Mr Dombek: Certainly. Mr Bell said he did not want to put words in my mouth, but we have no objection to the way the recommendation was framed.

The Chairman: You would be prepared to proceed?

Mr Dombek: Yes, we would be prepared to proceed on that basis, and in the event that the matter is resolved favourably for the complainant, obviously we would be in the position of reimbursing the Ombudsman for their legal costs.

The Chairman: Mr Philip, on your suggestion, I am just wondering in terms of procedure if we have to stand it down, as it is in a draft report, or if we should hold the recommendation as it is, on the record, and get a response from the Ombudsman--

Mr Zacks: Could I just make one other point just on the wording of the recommendation? When the committee has recommended payment of reasonable legal fees in the past, it has resulted in a great deal of discussion and argument between the complainant and the ministry about who is going to be paying the legal fees. In this case, it would be the Ombudsman, but "reasonable legal fees" in the past has been interpreted by the government as being the cheapest legal fees you can get away with.

What we need is some guidance in terms of what you think is reasonable. Is it intended for the Ombudsman to interpret "reasonable" in the way she feels is appropriate?

The Chairman: I can certainly answer that question at this point, and then if any committee members felt it was different--When we put "reasonable," it was with the understanding that you would be carrying it in your estimates for a year, two years, perhaps three years, and it would be deciding whether you appealed the process or if the ministry decided to make an appeal after the first instance in court. It is up to your discretion as to whether you would proceed with the appeal and pay those legal costs. I do not think our "reasonable" was directed towards pursuing this in the best manner you can, keeping in mind that perhaps a medium-priced lawyer would be appropriate, perhaps not the top of the scale.

Mr Zacks: The government has the best lawyers in the province, though.

The Chairman: Pardon?

Mr Zacks: The government's lawyers are quite skilled and excellent. The complainant would probably want at least as good a lawyer as the government has.

The Chairman: Mr Bell would expand on perhaps which.

Mr Bell: It is for the Ombudsman to determine two things; first, whether it is necessary for the Ombudsman to bear those costs. Please do not lose sight of that part of the recommendation.

As for the reasonableness, as a suggestion, the office of the Attorney General has a scale. Mr Dombek, I am sure, would be happy to share that scale with you. I understand that the top end of that scale is or is about to be $200 an hour. That is for most senior counsel. I would think that scale would be relevant and of assistance in this circumstance, because you cannot complete that process until you have identified legal counsel and it may be legal counsel of the complainant's choice rather than the Ombudsman's choice.

Mr Zacks: The Ombudsman essentially, then, is just to be the banker in this situation. We are not to have any role in the litigation itself. We are just to fund the actual carriage of the litigation. The decisions that are to be made by Farm Q or Farm Q's lawyers—You do not see the Ombudsman having any actual role, just bankrolling the case?

Mr Bell: You are not a party to the proceeding. That is very obvious. I do not know what you mean about role.

Mr Zacks: Bankroll, paying.

Mr Bell: You are not a party to the proceeding. You would not be participating in the proceeding. You would not have status to participate. It is an action private to the complainant.

Mr Dombek: If I can be of some assistance to Mr Zacks. In my experience, what ministries and agencies have done in the past is that they have entered into a retainer with the lawyer who is usually chosen by—The cases I am talking about are usually cases where people have to defend themselves in a criminal court, and obviously the ministry would not be involved. We usually enter into a retainer to pick up the reasonable costs. We agree to an hourly rate and agree to a maximum, agree to quarterly or interim payments and reviews of that account and so on. I would certainly be able to assist Mr Zacks or the Ombudsman if they need some information in that regard.

The Chairman: Mr Lupusella, I saw you starting to put your hand up earlier.

1030

Mr Lupusella: Yes. I would like to address the principle of our standing down the last part of the recommendation, as has been suggested by Mr Philip, in relation to the legal costs of the complainant. My position is to object to this suggestion. It is a full recommendation which was voted by the committee. I cannot tolerate the fact that Mr Philip would like to run this committee at his own whim, because this recommendation has been debated by the committee. We emphasized the pros and cons of the recommendation and there was a full discussion and there was a full vote. Now for him to suggest standing down the last part of this recommendation is beyond my comprehension.

The Chairman: Mr Philip, did you have any comment on that? You made that suggestion on the standing down of the recommendation —

Mr Philip: I think the reasonable members, who are the other 10 members of the committee, would obviously understand that the Ombudsman says there may be some legal problems in implementing this recommendation. It seems reasonable to allow the Ombudsman, since this is new to her, to have some time to look into that and to make a representation why the recommendation may or may not pose problems. I think that is simply being reasonable. I would suggest that we leave this matter and go on to the next item on the agenda and allow the Ombudsman to come back and advise us of her decision, having sought legal opinions on the act, next week.

Mr Cureatz: Having had the opportunity also of sitting in on this case in depth—much to my surprise, here we are again—I think it is only reasonable, from the way it seems to be going, that we wait a week to allow the Ombudsman to come back to try to resolve some of their difficulties. I would support Mr Philip's proposal.

The Chairman: My only comment would be that this recommendation is already in Hansard. We can stand it down, but our report will not be tabled this week. We have our draft report in front of us and that is where it will be included.

Mr Philip: But as chairman you well know you can table the report this week or next week or any other week you wish. That is the discretion of the chairman. You can even table it if the House is not sitting. There would be nothing preventing you from simply waiting a week to table the report.

The Chairman: I had no intention of tabling the report today.

Mr Philip: So it does not pose the problem. You have something on the record in Hansard, but you do not have the report tabled. I am just suggesting that you wait a week and let's see what the Ombudsman —

The Chairman: Right. I was not planning on tabling the report.

Mr Philip: Then the problem is solved; we are in agreement. Or at least you and I are in agreement.

The Chairman: The recommendation stands, but we will not review our final report or table it until the Ombudsman replies, which means it will not be debated in the Legislature. I think that is acceptable.

Mr Bossy: With the indecision here now, it just follows that at the same time the report does not state that it was a unanimous decision to go this route. Mr Philip will agree, I am sure, that we are running into the problems that maybe some of us could foresee. Not that I want to start debating it here, because I believe we are going to get involved. I cannot see the Ombudsman as being only the one with the bankroll with no input in the decisions that should be made. I agree very much with the Ombudsman's office that it has been put in a very bad position.

The Chairman: Legal counsel has informed me that he is unable to attend next week. Given that this really is a legal argument in many ways, I feel we should not deal with this matter for two weeks, until 12 July.

Mr Philip: And if the House is not sitting, at the first meeting of the committee during the recess.

The Chairman: Exactly. If the House is not sitting 12 July, then certainly at the first meeting we have, if that is acceptable. If you want to table your response earlier with the clerk, fine, but I feel that if there is going to be some ongoing discussion legal counsel and our researcher should be available.

Mrs Meslin: On 12 July or—

The Chairman: July 12 or when first we meet.

Mrs Meslin: September. You have tentatively asked for September.

The Chairman: September, but Mr Philip and I disagree on when we are rising. I bet we will be here on 12 July.

Mr Philip: I can get a substitute, but on 12 July I will be in Edmonton.

The Chairman: Are you not coming back on the 11th?

Mr Philip: Thursday. The conference finishes on Thursday.

The Chairman: I am supposed to go to Edmonton too. If the House is sitting, I will be here.

Mr Philip: But as chairman of the committee, I should at least be at the conference. I have two papers to present.

The Chairman: But I think we should have counsel in attendance, unless anybody feels we should proceed without it. I do not see anybody. Mr Bell had one question.

Mr Bell: Because the time when we are going to meet to discuss this next is imprecise and may be governed by the adjournment of the House, Mrs Meslin, through you to the complainant, will somebody look at the limitation period issue and make sure it is protected in some way? Minimally, the complainant should instruct legal counsel, if it is the complainant's desire to proceed, to initiate the appropriate proceeding to protect and preserve that limitation period. Mr Dombek would certainly understand why that is done and it certainly would not affect any issue for costs should the matter be determined in a different way ultimately later on. That is only my concern. Something is floating around in my head that there are some limitation periods approaching.

Mr Zacks: Would it not be possible for the ministry to undertake not to raise any limitation periods?

Mr Dombek: We have talked about this, and I think our position would be that we would not raise it as a problem. We would waive any problems regarding limitation periods. As the recommendation is to go the judicial process, we want to be as supportive and helpful as possible to get this matter resolved that way. If Mr Zacks, when he takes a look at it, feels the complainant should do something, certainly there is no difficulty there.

Mr Bell: As long as everybody has it in mind. If something can be worked out between the ministry and the complainant to remove that as a possible defence—

Mr Zacks: The only point I want to make, not to belabour this, is that the committee keeps putting the Ombudsman in a situation of advising the complainant on his legal rights. That seems to be the message I am getting, that we should be advising the complainant.

Mr Bell: No. Please do not understand. As I said, through Mrs Meslin to the complainant, there needs to be some attention given to the limitation period. It is not suggested that you act as legal counsel for the complainant in that matter.

Mr Zacks: Okay. As long as that is clear.

Mr Bell: On the other hand, I understand it is your office's practice that when there is a limitation period relevant to a complaint, you inform the complainant of that fact and the complainant then decides what, if anything, to do. It is not suggested that you are assuming the duty of legal counsel. That is not the case.

Mr Dombek: As this is a matter which in two weeks' time or whenever --that really is between the Ombudsman and the committee---May I withdraw and may we assume that our role in this matter is finished?

1040

The Chairman: It may not be finished. We may have to find costs with someone, Mr Dombek, but I do not think your attendance is necessary in two weeks, unless anybody on the committee feels it is necessary?

Mr Philip: Are you under or over budget at the moment in the Ministry of Agriculture and Food?

Mr Dombek: We are severely over budget. I am sure the farm community would rather see some of its money spent in other areas than commencing litigation.

Mr Philip: Unless you are the farmer in the farm business affected.

Mr Bell: So long as Mr Dombek has confirmed the ministry's position that it does not object to the process which is contemplated by the recommendation that is read, particulary with respect to the Ombudsman's funding portion of legal costs pending the determination of the issues, I concur there is no reason for a reattendance.

## CASE OF MRS H

The Chairman: The committee will now deal with the Ministry of Education and the denied case of Mrs H.

We have a representative from the Ministry of Education, Mark Larratt-Smith, the assistant deputy minister of the Ministry of Education, and Reva Orlicky, analyst with the teachers' superannuation unit.

We have given to committee members the most recent letter from Bernard Shapiro, the deputy minister of the Ministry of Education. It is dated 15 June. Committee members saw this letter last week, but just in case you want it in front of you again.

As committee members will remember, we dealt with the case of Mrs H last

August and made subsequent recommendations, one of which was that Mrs H's pension be paid and also that legislation be introduced to allow people in the same position as Mrs H to be paid some kind of survivor allowance or pension. The letter outlines that legislation will be introduced in the near future which will address the problem of Mrs H. They hope the effective date will be 1 January 1990, but Mr Shapiro in his letter said that the ministry is not prepared at this time to make any kind of ex gratia payment to Mrs H.

The Ombudsman has presented to us that the recommendation stands that Mrs H should be paid some time before this legislation is enacted because she is in frail capacity. The committee felt it was important, even given this most recent letter of 15 June, that the ministry have the opportunity to make a presentation to the committee on its position in this matter.

That is the background. Mr Larratt-Smith, if you would be willing to have a few comments.

Mr Larratt-Smith: Thank you very much. You correctly referred to Bernard Shapiro's letter, because it does represent the position of the ministry at this stage.

The one piece of information I can add to it is that, as I am sure members will be aware, the proposal is to introduce changes to the Teachers' Superannuation Act very imminently. They include a variety of subjects, including the particular amendments Dr Shapiro made reference to, but also other areas of difficulty with benefits and, much more significantly in a legislative sense, coming to grips with the Treasurer's (Mr R. F. Nixon) announcement in the budget with regard to changes in the teachers' superannuation fund.

On that legislation we are actually at this moment waiting for the final draft back from legislative counsel. Our hope is that it would be introduced into the Legislature before the end of this week. We are very imminent on that particular introduction. That is the current situation. Pending that introduction, I obviously find it difficult to go into much more detail than we have tried to provide to the committee in terms of the way of handling this particular situation in the legislation.

Beyond that, I would certainly be happy to comment on the process here. I think we are very aware in the Ministry of Education that this has been a long process. There have been a lot of delays, not all of them the responsibility of the ministry, although we have certainly taken time, in part because this issue has been caught up in very much larger issues that were going on at the same time. I would be very happy to comment on the chronology of that, if it were the committee's wish.

I note, for example, that there have been about four sets of recommendations put forward. They have varied, and to some extent we have shifted in terms of trying to respond to the recommendations as the recommendations themselves have changed. We appreciate that this is one that has hung on for a very long time. It is our hope that the new pension legislation will be in force for 1 January, and when that comes into force Mrs H would then be able to qualify from the Teachers' Superannuation Commission for a pension based upon the implication that her spouse had chosen a 50 per cent option, which is the option available now in the current legislation. That pension would be available to her from the date of her application to the commission, which I understand would be August 1985, so virtually from the time of her husband's death.

Mr Bell: Mr Larratt-Smith, I cannot recall the particulars of the last discussion with representatives of your ministry, but the issue I want to discuss with you goes something like this: First, for confirmation purposes the amendments you have just referred to, as and when enacted, will make Mrs H eligible for benefits in the terms as set out in Dr Shapiro's letter, and in particular the second item on page 2?

Mr Larratt-Smith: That is the intention, yes.

Mr Bell: Then, if we assume the legislation is passed in the form intended by your ministry, it would be more than an intention: It would be a future circumstance of entitlement for her.

Mr Larratt-Smith: I am not sure I understand the distinction you are making.

Mr Bell: I am not trying to make a distinction. Trying to put this in the bluntest terms, if the amendment passes she gets something pursuant to the legislation. You are nodding yes. I recall when representatives of your ministry attended, I believe the last time, and the executive director of the superannuation plan also attended. They gave us an example where, I think it was the minister, Mr Ward, had announced amendments to the superannuation act on a matter and asked the superannuation plan to fund those in advance pending the passing of the legislation. Everybody acknowledged that it was not an ordinary way of proceeding and the circumstances made it an appropriate and extraordinary measure.

1050

If that is the case and if you have done it in the past with the superannuation plan, why can you and the plan not just sit down and get together with Mrs H and say: "Look. She is going to get it when it is passed, like we did last time. Why don't we give it to her now?"

I will not speak for the committee. I will just speak for myself. I am not suggesting by this that there be an entitlement in terms of calculating entitlement, that she not get something on an entitlement basis earlier than the legislation. What I am saying is why cannot she get what she would be entitled to under the legislation, because of her extraordinary and, I think, fairly tenuous personal circumstances, have it early and then adjust when the legislation is enacted.

Mr Larratt-Smith: That is a possibility that we explored on the basis of the committee's recommendation last summer that we should cause the Teachers' Superannuation Commission to make such a payment. I cannot speak on behalf of the Teachers' Superannuation Commission, nor its executive director, but we did explore that option very thoroughly. The legal advice we received was very unequivocal and it was that the minister had no authority to request or demand that the commission make such a payment and the commission, in fact, did not have authority under this set of circumstances without reference to other circumstances to make such a payment. That avenue was, in fact, closed to us.

Mr Bell: It is a little ironic in view of the previous discussion, but what we were told by the ministry, and then confirmed by the executive director, is that it has been done in the past, albeit on an extraordinary basis. You are not the only ministry where this committee has heard that, in appropriate circumstances, there are extraordinary payments paid.

I guess what we are saying is, and it applies to everything we have talked about this morning, is where there is a will, there is a way. As I say, speaking for myself, it is not a question of whether this individual is to get more than she would be entitled to once the legislation is passed, just that what she is entitled to is to be paid earlier.

Mr Larratt-Smith: I think the point is that the entitlement does not exist until the legislation is amended in that fashion. We are dealing with a pension plan here where it is not simply a matter of policy but a matter of the wording of the legislation. We did explore with considerable thoroughness all of the options that might be available to achieve the express desire of both the Ombudsman and the committee of making such a payment in advance.

The avenue, as I mentioned, of causing the TSC to make such a payment was closed to us by the legal advice we received. We also looked at other options. As the Ombudsman, I believe, said in one of the recommendations that was put to us, the only option that might have been available would have been the adding of a line into the ministry's estimates. In fact, we looked at that as an option and that option was rejected by the government and, I think, raises a principle which raises two kinds of issues; mechanical issues having to do with how one would treat not just Mrs H but others who are found to be in the same circumstances and so would treat fairly that entire class of persons.

It also raises some issues in principle in terms of this kind of payment being made in that way in response to circumstances which come from an investigation by the Ombudsman. Those kinds of issues go well beyond the case of Mrs H or even the matter of pensions and certainly the responsibilities of the Ministry of Education.

Mrs LeBourdais: I am disappointed to some degree that this meeting has to even be taking place today. I feel my responsibilities and my role on this committee are partially--and I think this is shared by a number of my colleagues, although I am not wanting to speak for them--it is our position to go to bat for the little guy, so to speak.

It seems to me that a directive was given. It was not only not followed through on, but a lot of stalling has been taking place. When you say that you consulted a legal opinion and got one that there was no avenue open to you, I guess a side of me wants to say, "Get another legal opinion." Where there is a will, there is a way. If I have to give up on that little cliché, I do not know where I would go.

There has to be a way because there are extraordinary circumstances here, those being age and, I gather, not the greatest of health. We are talking about an indication on your part that it will come to be, but perhaps January, February or March of next year would be the earliest. I am cognizant of the fact that you do not want to set a precedent, and perhaps that has some merit to it, but that having been said, I think there has to be a way. Where there are unique circumstances, the rules have to be there in such a way as to allow for flexibility of those rules for unique circumstances, and I think those exist at the moment.

Surely there must be another way. I do not know if the minister himself has any special prerogatives that he can bring into play. Perhaps partial payment could be begun, with the rest to follow once the legislation comes through. At least there would be an indication, not so much on our part but rather on your part, of a strong intent to address the situation and to show

some kindness to this woman. What have we achieved if, heaven forbid, this woman passes away in November and the ruling comes through in her favour in January? Where are we then?

Mr Larratt-Smith: First of all, we are not totally heartless within the Ministry of Education. I would also, with respect, dispute your use of the term "stalling." We have taken a long time, there has been a lot of time pass on this issue, and it certainly has taken us more time than we would like to deal with it, but there has been no intention at all of stalling as such. It is a difficult issue.

There are three components to the issue as we see it.

The first one is the Ombudsman's conclusion that there is a degree of unfairness in the treatment of persons in Mrs H's circumstances, given that the act was changed afterwards and allows other arrangements. The ministry has looked very carefully at that and we have certainly agreed that would appear to be the case. That is certainly something we are attempting to rectify in these legislative changes.

The second issue that was raised was the matter of the charter and the charter implications of this particular case. We consulted with the Ministry of the Attorney General on that. That took some time, as you can imagine, because it is a relatively complex case, and the advice we got back was in no way definitive other than that the ground of marital status was not particularly a charter issue in this case. Again, in the proposed amendments, we are moving to try, as is the general government policy, to eliminate the potential for charter problems to arise, even when they are not very clearly defined by the courts.

1100

The third area, which is the one that you speak to, has been the one that has given us the most difficulty of all, and that is the issue of Mrs H's personal circumstances. We are not in a position, other than very indirectly and in a hearsay sense, to be aware of those. It is not the responsibility of the Ministry of Education or the Minister of Education (Mr Ward) to be in the adjudication business. That is the Teachers' Superannuation Commission's responsibility. Our responsibility is to ensure that the legislation is appropriate so that they can do their job.

In fact, that is all within the context that pensions are a contractual relationship. One of the difficulties with pensions in the whole area of the charter is that in a sense—and I am not speaking as a lawyer here—pensions discriminate by different age, by different work experience, by all the different characteristics which go into one's pension entitlement, and the actuarial calculations differentiate one person from another. So we have to be particularly careful in that regard.

We have been indirectly aware, certainly, of the Ombudsman's concern and of this committee's concern about the individual in question. I must emphasize that we simply have not had a way to overcome that other than to put a line in the ministry's estimates. You speak of the minister's prerogatives. Without going into all the details—and I am sure the lawyers present would know more about this than I—we looked at the mercy of the crown or various other particular formulae that might be available and the advice we received was that it was simply not possible.

The option of making a direct payment through the estimates, as I mentioned before, not only creates difficulties--because then how do you treat another class whose members are not named and are ill-defined, other than in a negative sense, as people who do not qualify under the law for an entitlement--but there is the principle of whether a payment would be made from general government or tax revenues to a situation which is really not a matter of social welfare, however much the circumstances of the individual may be straitened in this case, but is really a contractual relationship that was entered into by her late husband, on which he counted as he worked and on which he retired and took a pension. The action that is being taken in that sense is retroactive legislative action.

I think the unfortunate part is, first of all, that when those rules are contained in legislation with the degree of precision that now exists, you have to change the legislation in order to allow for the kinds of results that the Ombudsman and this committee were seeking to take place. We have been caught in that trap. We have also been caught in the fact that all this was going on at a time when very major issues were being discussed and considered with regard to changes in that legislation itself.

The Chairman: May I interrupt the committee for just a moment? I want to draw attention to the fact that we have a visitor in our gallery. It is Mary Eugenia Charles, who is the Prime Minister of Dominica. We welcome you here today and we are glad that you have come and joined us, for a few minutes anyway, during your tour of Queen's Park.

Mrs LeBourdais: That was a rather lengthy reply. I did have another question.

I guess if we were in the business world and not in the government world and I was the senior person, I would at this point be saying to my people, "Go out and find a way and do not come back until you do." I know those are pretty hard parameters and I realize this is not business and you have guidelines, and believe me, I am not trying to imply that you are heartless, etc. I realize that you have made an effort.

But bottom-line, it seems to me that you are still saying that in spite of having made those efforts, at least to date, you have not been able to come up with a way other than allowing the legislation to run its due course. Do we then simply have to live with that fact or by being more creative, by bringing in other individuals, is there still no other way that an answer can be forthcoming that might be at least developed in a more speedy manner?

Mr Larratt-Smith: Realistically, there is no way in the sense that there is no entitlement for this lady under the current law. Therefore, changing the law is the obvious way of resolving both her situation and the situation of others like her.

The only other alternative I have mentioned to you was in the estimates process, which was considered and rejected by the government because of its implications beyond this situation. Even if the government were to reconsider that, I am not an expert on interim supply, but one would presumably have to put it in a supplementary estimate or something of that kind. That is something the government has looked at and has rejected as an option.

Mrs LeBourdais: Again, my terminology gets lost with the whole teachers' side of things and superannuation. But since that is one of their people, or the wife of one of their people, is there any way they have a route

whereby they could temporarily release funds and then when the legislation comes through, there is a reimbursement. I am just throwing out an idea.

Mr Larratt-Smith: You are presumably speaking of the teachers' federations.

Mrs LeBourdais: Yes.

Mr Larratt-Smith: I would not be able to speak for them.

Mrs LeBourdais: Could we ask? Is that not an avenue that is open, that through their kindness they could permit that kind of thing to happen, with the understanding that as the legislation comes through payment would be made?

Mr Larratt-Smith: I would find it difficult to comment on that. Obviously, they could be approached. We have discussed this issue and the general case with them. As we informed the committee, the matter of adjusting benefits in the pensions legislation, adjusting the rules under which those benefits are provided, is a relatively complicated process, especially when it involves a degree of retroactivity, because it affects the value of the pension fund for every other beneficiary of that fund.

It affects the potential contribution rates of both the current participants and of the government as sponsor of the plan. So the issues are complicated and this was one of the issues that was discussed during a series of meetings of a working group on the revisions to the plan that took place over the past winter. The representatives of the teachers' federations would be well aware of this situation.

Mrs LeBourdais: Just in closing, obviously I do not necessarily see the responsibility as being solely with the ministry. I think perhaps there might be some degree of responsibility with the teachers themselves. I would suggest to you that if you feel there would be any way of posing that possibility to them just to see what it might bring forward, then I would encourage you to do so.

1110

Mr Philip: Mr Larratt-Smith, I take it that when you talk about about a legal impairment, you are talking about a legal impairment only to the superannuation fund; there is no legal impairment to the ministry paying this with the understanding that it would be recovered from the superannuation fund after the legislation was passed. There is no legal impairment to the ministry

Mr Larratt-Smith: Let me try and be as clear as I can on that. You are correct that the problem is, in the first instance, a legal impairment that the pension commission cannot pay. As I already mentioned, we looked at the other potential avenue, which was the payment on an interim basis out of general revenues.

The whole question of a loan out of general revenue to be recovered from the Teachers' Superannuation Commission is probably complex beyond the circumstances involved, particularly once one gets into not just the one individual but providing the same kinds of opportunities to other individuals in the same circumstances.

Mr Philip: With respect, you are making it unnecessarily complex. We

are dealing with one case here. There is only one case before us. We are not talking about anyone else. No one else has asked for this. No one else has gone to the Ombudsman. We are dealing with only one case. Your suggesting a whole bunch of other cases at the moment when, in fact, the committee is recommending on only one case, really is a bit of a shell game that you are playing with us.

Your answer then is fairly clear. There is no legal impediment to you as a ministry paying it, is there? It may be a nuisance. It may be complicated. It may have your accountants working an hour or two of overtime but there is no legal impairment. Is that correct?

Mr Larratt-Smith: The ability for the ministry to make a payment would depend, as I have already indicated, on there being a specific line placed in the ministry's estimates to do this.

Mr Philip: And my question to you, for the third time, is, there is no legal impairment to that happening, is there?

Mr Larratt-Smith: If you put it in terms of the governments ability to do that, you are quite correct. If I might, before you continue, you indicate that the committee's only interest is in Mrs H.

Mr Philip: That is what the report is about.

Mr Larratt-Smith: There are, as I pointed out earlier, four sets of recommendations. There are recommendations that have been put before us, both by the committee and by the Ombudsman, with regard to the same class of persons to which Mrs H belongs. Irrespective of that having been included in the recommendations, we have felt it incumbent to try to deal with not just one individual, but with a general group and the implications of the treatment of an individual for a general group.

Mr Philip: Notwithstanding the total number of recommendations of the committee, the only one that the committee recommended be paid now was Mrs H. Is that not correct?

Mr Larratt-Smith: Let me just review, in fact, my understanding of the recommendations that were made.

The initial preliminary findings of the Ombudsman in February 1988 were simply to amend the act. The recommendations--

Mr Philip: Stop there. The amending of the act does not require the payment of anybody so far, other than after the act has been amended.

Mr Larratt-Smith: That is right; which is exactly what we are meeting.

Mr Philip: So you are not paying a whole slew of people now by implementing that which you have already started.

Mr Larratt-Smith: As I understand it, the recommendations of the Ombudsman's final report, which was dealt with last summer, indicated that payments should be made to other surviving spouses in situations similar to Mrs H. I am informed that we already have five or six other requests or indications of individuals who believe they would fall into the same entitlement.

Mr Philip: If I may redirect the question to the Ombudsman, was that not in the context of the legislation, but the only one that the Ombudsman was asking for immediate payment of, at this point in time, was Mrs H? Is that not correct?

Ms Morrison: Our original recommendation was that Mrs H be paid immediately. It also recommended that other people in the same situation be eligible from the day they applied as a result of our recommendation.

Mr Philip: That is what the legislation would do?

Ms Morrison: We had recommended that it be done notwithstanding the changes in the legislation. So we had, in truth, recommended that those people be paid ahead of any legislative change as well.

Mr Philip: So you are talking about five people?

Ms Morrison: No, our understanding from the teachers' superannuation fund was that there may be 14 people in this situation.

Mr Larratt-Smith: The point is that nobody knows for sure because people have to self-declare before we know how many there are.

Mr Philip: So we have ascertained that there is no legal impairment for your doing that through an estimates process. Is there anything under the Manual of Administration that would prevent you from doing it?

Mr Larratt-Smith: Separate from the estimates process?

Mr Philip: Yes.

Mr Larratt-Smith: Yes. My understanding, on the basis of the legal advice, which looked at a number of different avenues of possibility because the request was, "Is there any way, leaving aside the teachers' superannuation fund, the government can make this payment?" The answer we received was that the only way of doing so would be through the estimates process. That was the only way.

Mr Philip: You have said that several times and we have agreed on it. I do not know why you keep repeating it. My question was: We know that there is no legal impediment now to dealing with it in the estimates process; is there anything under the Manual of Administration that, in any way, prevents your from doing it under the estimates process? Would you answer that question?

Mr Larratt-Smith: Okay. I had understood your question to have been in a separate sense, would the Manual of Administration allow such a payment. My answer to that was no. My answer is, if it is in the estimates process, the Manual of Administration would not stand in the way of such a payment.

Mr Philip: Did you seek the advice of your internal auditors or the Provincial Auditor to find out whether there were any problems in the way of accountability or the accounting process, the auditing process, that would, in any way, impair you from carrying out the wishes of this committee?

Mr Larratt-Smith: I certainly did not and, to my knowledge, the ministry did not check with the auditor specifically because I do not believe that was ever the point at issue. The issue was, as I have already mentioned,

both from the mechanics of how one might make such a payment and extend such a payment to the class of persons that we are speaking of, and secondly, and more importantly, the policy issue as to whether, whatever the individual circumstances, a payment should be made from general government revenue for someone who does not have an entitlement in law as a result of a pension contract. The decision of the government was not to do that.

Mr Philip: In layman's language, what you are saying is: Did you have the authority to do it? That would be the accounting question; that would be the auditing question. You have now indicated, in a very long answer, that you did not seek the opinions, in that matter, of either your internal auditors or of the Provincial Auditor.

So we have learned, through a series of questions: (1), that there is no legal impediment to your doing it through the estimates process; (2), that there is nothing in the Manual of Administration, which governs the general administration of government, that would in any way, to your knowledge, prohibit you from doing it; (3), that you have not checked, either with your internal auditors or with the Provincial Auditor, to find out whether or not there was anything that, in fact, would indicate that you did not have the authority to make such a payment in that method.

My question then to you is: Would you not agree that the very fact that you have introduced this legislation is an admission that Mrs H and people like her, in fact, are deserving of these funds? Why could you not be flexible enough, understanding Mrs H's circumstances, to pay the lady since she is going to be paid anyway and since there appear to be no legal or accounting reasons as to why you should not do that?

1120

Mr Larratt-Smith: I am trying not dispute this with you because I think we are both interested in getting the information available but the preambles to your questions are one of the reasons why I have to take so much time in answering. The fact is we do not have the authority. The only way we could get the authority would be to seek it from the Legislature, through the estimates process.

So the question of the Manual of Administration and the question of internal audit do not come up because they would only flow from the voting of money by the Legislature. That is what it would take, in effect. It was the decision of the government, given the circumstances, given the difficulties and given the fact that the pension fund itself is the appropriate vehicle for this, that the change should be made in the pensions legislation but that a payment should not be made from general revenue.

Mr Philip: You have an all-party committee of the Legislature that has asked you to pay this lady, you have a supplementary estimate that could be slipped in before the House adjourns; it would take all of three minutes maximum to introduce it with this kind of support from all three parties. Where is the problem then in going through the estimates process in the House?

Mr Lupusella: That is not necessarily true. The decision was not unanimous. Speak for yourself.

Mr Philip: I said it was an all-party decision. If you are suggesting that no Liberals voted for it--

Mr Lupusella: What I am trying to say is that the decision was not unanimous.

The Chairman: Could I call the member to order for a moment?

Mr Philip: We know that Mr Lupusella always votes for the government's side, people who are like Mr Lupusella have to prove their loyalty to their new bosses.

Mr Lupusella: Again, speak for yourself.

The Chairman: Mr Philip, do you have any further questions for the assistant deputy minister?

Mr Philip: I would just like Mr Larratt-Smith to answer.

Mr Lupusella: There are other people who would like to speak and Mr Philip is using all the time available to this committee just to pursue one particular item of legal impairment which the government has, because this woman, legally speaking, does not have entitlement to the benefit. He is confusing the whole issue.

The Chairman: Mr Lupusella, if you would like me to put on the list, I would. I would encourage Mr Philip to conclude his questioning soon, but he has been on the floor exactly as long now as Mrs LeBourdais was. I am exercising the chairman's discretion of trying to proceed to the three other people on the list, but I think Mr Philip was within his time range.

Mr Philip: I will just ask Mr Larratt-Smith to answer that question. I am sorry about taking this much time but I am sure the others members of the committee follow my line of reasoning. For Mr Lupusella, I am sure that I would have to take a lot longer. Mr Lupusella is the only person I know who takes an hour and a half to watch 60 Minutes.

Mr Carrothers: Could we carry on?

The Chairman: If you could repeat the last part of your question.

Interjections.

The Chairman: Yes, I would like it if you could keep yourself out of this little internal squabble we have and proceed with the answer, I would appreciate it.

Mr Larratt-Smith: I can only respond (inaudible) again underlining the distinction between a pension entitlement—however worthy the individual case may be or the class of persons may be, the fact is they do not have a pension entitlement at the moment. So that makes it a different kind of issue. I suppose the question, that is an obvious one that the government has to deal with and that this committee may in fact want to consider, is where do you make special payments and to which kinds of people do you make special payments out of general revenue?

Mr Philip: Maybe the answer to that is, when the Ombudsman's committee orders you to, it is a good idea to do so. That is the answer to that question.

Mr Lupusella: Come on, you must be kidding.

Mr Charlton: I realize that the position you are putting here today is one that has been dictated by the government, meaning the politicians in this case, so that you are in the position of responding to questions from that perspective. But let me put it to you that the position you put to us is just a load of rubbish. The government, when it chooses to, makes payments to all kinds of people who have no legal entitlement to those payments.

I will give you one example right now. The Ministry of Community and Social Services on a regular, daily basis grants welfare payments to people who are not eligible for welfare, on an assignment basis while they are tied up in an appeal process with another government agency where they may have some eligibility. That process is a daily process of government in this province. They have a little form they call an assignment form which thousands of people in this province sign every day in order to get benefits to which they are not entitled under legislation.

I go back to the comment that was made by Mrs LeBourdais at the outset: Where there is a will, there is a way. What is lacking in this case and the reason payment has not been made---Whether it is payment to Mrs H or payment to five or payment to 14 or payment to 22 or 66 individuals is irrelevant. You are in a situation where you are in total control of the process. It is the Minister of Education who is going to introduce the legislation to amend the teachers' superannuation fund legislation. He is in a position to know what those amendments will say and, therefore, what the one or five or 14 individuals will ultimately be granted. He is in a position to design an assignment form to cover his own behind in terms of full repayment of that money to the Ministry of Education.

So there is absolutely no reason, based on the kinds of processes used by this government on a daily basis, why these payments cannot be made. It is the will that is lacking. I think we need your comment on that on the record.

Mr Larratt-Smith: I would have to dispute your remarks.

Mr Charlton: Do you dispute that assignments are made on a daily basis to people who have no entitlement under legislation?

Mr Larratt-Smith: What I can dispute is that there are assignments made by the Ministry of Education with regard to individuals who may be in difficult circumstances but who do not qualify under existing legislation for a pension.

Mr Charlton: It is because the Ministry of Education, perhaps, does not have the will.

Mr Larratt-Smith: With respect, it is not that. The issue is that we are dealing with a pension scheme; we are not dealing with a welfare scheme here.

Mr Charlton: A welfare scheme is legislation, the same way the superannuation fund for the teachers is a legislated pension in Ontario. So there is a direct parallel.

Mr Larratt-Smith: With respect, my understanding of what the Ombudsman has been saying and what the committee has been saying is that they wish it dealt with not in terms of, "Here is an individual who is particularly needy and therefore should be granted some special consideration under the province's welfare legislation." Presumably had that been the case, an

application would have been made to the Ministry of Community and Social Services, not to the Ministry of Education. As we have had the recommendations placed before us, they have all been in terms of pension entitlement and pension legislation. That is the only way I can respond.

Mr Charlton: You are still missing the relevant point. If the application had been made to the Ministry of Community and Social Services, and there was no entitlement but the Ministry of Community and Social Services could clearly see where the money was recoverable, it would have proceeded without authority to grant an assignment. They have the will to do it. In this case, it is the will that is missing in the Ministry of Education; not the ability, the will.

Mr Larratt-Smith: I cannot comment on that. It sounds to me that you are saying the Ministry of Community and Social Services either has a general power or regularly exceeds its power. I am not in a position to comment on either of those things.

1130

Mr Carrothers: I would like just to make sure I am clear. Assuming this legislation is put in as proposed or intended right now and it does pass, Mrs H is going to be entitled to a 50 per cent survivor's pension. Is that right?

Mr Larratt-Smith: That is the intent.

Mr Carrothers: It will be back-dated.

Mr Larratt-Smith: The intention, as I believe is mentioned in the letter, is that the new entitlement which would be granted in the legislation would be available to individuals in Mrs H's circumstances from the date they first contacted in writing the pension commission.

Mr Carrothers: In Mrs H's case that probably is going to be some time ago now.

Mr Larratt-Smith: As we understand it from the information available to us, it is virtually the period in which her husband died.

Mr Carrothers: At the risk of flogging a dead horse, I am still having a little trouble getting my mind completely around this difficulty with the estimates. I wonder if you could go around it once more. Are you saying the ministry can only expend moneys which have been authorized by some line in the estimates? Is that basically the problem here?

Mr Larratt-Smith: That is right.

Mr Carrothers: Is there no discretionary line in those estimates?

Mr Larratt-Smith: Not in this regard.

Mr Carrothers: When you say "in this regard," what would make a difference?

Mr Larratt-Smith: There is no discretion that would cover this kind of payment.

Mr Carrothers: This kind of payment. So you will know on the anticipation that something is going to happen, that there is nothing like that. The minister has not—

Mr Larratt-Smith: That has been our advice, yes.

Mr Carrothers: Do other authorities, such as Management Board, have the ability to amend those estimates? Does it not do that sort of amendment to the estimates?

Mr Larratt-Smith: The advice we have received is that it would take in effect the action of the Legislature through acting on the ministry's estimates, for such a payment to be made.

Mr Carrothers: Supplementary estimates.

Mr Larratt-Smith: In whatever form.

Mr Carrothers: At this moment, I do not think the estimates of the ministry have been passed yet by the Legislature, have they?

Mr Larratt-Smith: They would not be passed for this year, I believe.

Mr Carrothers: They still could be changed.

Mr Larratt-Smith: If I might make one additional comment, again, to re-emphasize that there are two different sources of payment that are being mentioned here: one being from a pension fund which is partly supported by the government and partly by the beneficiaries of the fund, and the other from the consolidated revenue fund.

Mr Bell: Maybe if nothing else but for symmetry, Ms Orlicky, I believe you were with the committee when—You are shaking your head no, so you were not.

It is too bad we do not have here the transcript of when it happened; maybe we should dredge it up and refer back to it. We were told of a specific example where the fund did pay, in advance of legislation, moneys at the request of the minister. That legislation was imminent. I think this, in some way, is what is motivating comments by committee members. We have heard that it has been done once on an informal basis, and when the legislation was then enacted, there were the appropriate adjustments.

I know what you are telling us. I accept totally the sincerity of the efforts made by the ministry with the fund to have something paid on some advance basis, but can we explore that more? Can you go back with the weight of this committee's recommendations and views and with the obvious weight of the will of your ministry, which I take to be, "If we can find a way, we'd like to have this lady paid," and say to the fund: "Look, here's another one of those cases. Just let's do it and then we can adjust later"?

I believe I heard from the executive director and I believe I learned from other sources that there is some discretion in that fund for some payments which are either going to be ultimately sanctioned by authority or come under the heading of humanitarian reasons, for want of a better expression right now. Can you comment on that? What are you showing me?

Mr Larratt-Smith: Everybody is looking at the transcript.

Mr Bell: Anyway, can you comment on that?

Mr Larratt-Smith: I can try to do so. The issue, as you correctly state, is not a matter of will. As I have already stated, we did investigate this option, because it would make sense if it could be done. We were advised that in these circumstances it was not an option, either for the minister in terms of the minister's power to cause the commission to act nor the commission itself to act.

In that respect, I cannot speak for the commission, as I have said. My understanding is that there is a distinction between the case the commission was referring to and this case, having to do with one being a benefit entitlement and the other being a matter of interpretation with regard to an entitlement.

Mr Bell: I think I can assist. It is the committee transcript of 22 August 1988, at page B-38. There is an exchange between Madam Chairman and Mr McArthur, the executive director of the fund; I guess it is about 60 per cent of the way down. This is in the context of trying to find a way of having this payment made. The issue of directives or directions from the minister came up.

Madam Chairman asked: "Has he made a habit or any previous recommendations, directions, directives? Has he done this in the past? Can you point to anything that would be similar?"

Mr McArthur said, "The only one I can think of off the top of my head is that our act has not been amended to bring us into line with the Canada pension being entitled as early as age 60. The minister has advised us that he intends to introduce legislation to rectify that situation and has asked us to comply with it in the meantime, which we have done."

We are dealing with a pension entitlement benefit, notification by the minister that he intends to introduce legislation, and a request to comply in the meantime, which they have done. They have made a payment out of that fund pursuant to some ability or authority that they have identified in those circumstances.

I must say that it was my feeling at the time, and I think it was shared by the committee members, that this sounded an awful lot like the circumstances here, where the minister now says: "I have legislation, which is going to be introduced within the next week and a half. Will you rectify the situation in the meantime?" Comment?

Mr Larratt-Smith: My comment would be that the advice we had, and obviously we had the transcript available to us and obviously we were looking at this particular possibility, because there is no reason, I should point out to you, for the ministry to be reluctant or to resist these particular things--We recognize the Ombudsman's concern. We recognize the committee's concern. Our responsibility, however, is obviously to do things according to the law. The advice we had was that the circumstances were different. The case of paying an individual benefit to a person or to persons who do not currently have an entitlement under law is different from dealing with the overriding impact of another level of government statute.

I do not want to get into detail on that, because I am not a lawyer and I would have to get you further detailed legal advice on that--

Mr Bell: Was that an opinion from legal counsel within the ministry or from legal counsel proffered by the fund?

Mr Larratt-Smith: That would have been from the government's lawyers.

1140

Mr Bell: Every time you get lawyers in a room, you know what happens. I am one of them, so I can say it. Is that the logjam, the opinion of legal counsel?

Mr Larratt-Smith: Yes, indeed.

Mr Bell: This is not intended to nor does it in fact cast any comment upon that opinion. I am sure that was an opinion very thoroughly well thought out and well given, but things have changed in the meantime. We now have an act that is imminent. I do not think we had an act that was imminent before. I think an argument is available that in both circumstances there was no entitlement, and legislation to be enacted to make entitlement.

Is it appropriate to ask you to consider having legal counsel take another look at it? My clients ask me all the time to take second, third and sometimes fourth looks at opinions I have given where the circumstances have changed. This seems to me to be that type of situation. I know your legal people relatively well. I have worked with them. I know them to be very thorough and highly competent people, usually quite willing to take second looks at matters where the circumstances have changed. Can I take it upon myself, on behalf of the committee, to make that request, and if you could report?

Mr Larratt-Smith: Yes. We would be entirely willing to take another look at it. As you say, the circumstances have changed or are in the process of changing given the commitment to introduce legislation. We would certainly be prepared to look at that again and see if there is any way of attempting to go in this direction.

Mr Bell: Looking at the time frame, this committee will probably reconvene two weeks from today. That is probably enough time to have you or somebody on your behalf, maybe your legal staff, come back and advise what, if any, different view they might have on it.

Mr Larratt-Smith: I am sure we could provide that advice at that time.

Ms Morrison: I gather this is going to go back for another legal opinion and come back in two weeks?

The Chairman: That was the suggestion made. I have not asked the committee on that yet.

Ms Morrison: We do of course have serious concerns with what process is being followed here. In the case prior to this, the committee suggested to us that we should put something in our estimates, and that would not be any problem. The ministry is saying, "We don't feel like putting anything in our estimates," and the committee surely is not going to be in a position to accept that view.

The problem with this case is that we are coming down now to questions of whether it is legal, etc. Of course, an Ombudsman case such as this one, which is a very typical and very good example of Ombudsman process, was never intended to address only those cases where people are legally entitled to

things. The whole reason we are here and the whole reason we recommended an ex gratia payment was that the unfairness suffered by Mrs H by virtue of the fact that she was not legally entitled under the pension fund could only be addressed by an ex gratia payment, in the Ombudsman's view. Any arguments about whether she is legally entitled under the fund are irrelevant to the Ombudsman's recommendation. That is why we made the recommendation in the first place.

We are hearing that the government does not want to pay Mrs H. That is sometimes what is being used. The Ombudsman process we have used over the last 14 years is for the Ombudsman to ferret out these unfairnesses, for us to come to this committee, and for this committee to be the representative of the government of Ontario in making sure the unfairnesses are addressed. What we are hearing here now is that this committee can say whatever it likes, but the government does not feel like doing it.

I think there are two separate lines of thinking. There is an Ombudsman process line of thinking which says, "If there is an unfairness, a way can be found to address it," and there is a legal way of thinking, "Look at the fund and see that she is not entitled," which would always prevail, absent the Ombudsman process.

Mr Bell: The suggestion made by me, and if concurred in by the committee, is designed quite frankly to see if we can identify and obtain a result as quickly as possible. You have known me for long years. I do not really care how we get the result as long as we get the result and as long as the means are appropriate and legal.

It seems to me that if we have a past experience of the fund paying something in similar circumstances, I think it is appropriate to ask the ministry to have its legal counsel not give another opinion but take a second look at their first opinion. That is only two weeks. I do not think you should presume that the committee has discarded the recommendations it has already made, some of which go to the issue of putting things in budgets.

That is my explanation of why I made the suggestion. We are at an impasse. If this one does not work, the alternative referrable to budgets, I would suggest, is not going to be resolved in two weeks.

Mr Bossy: There was a comment made concerning the government not being willing to pay. I do not think that is the case. It is a case, as I have understood it, that there was no legal way of paying. I know we are repeating many things here, but the fact is that we suggested an ex gratia payment and the government says there is no mechanism we have to be able to accomplish this. We recommended to the ministry, "Go back to the drawing board and make a mechanism available." The government itself has now proceeded with legislation that is coming forward to make that available, to make it legal.

I think it would be irresponsible on the part of government, too, for every little occasion that comes along which needs more money--The committee has recommended ex gratia payments several times, and it is very difficult to fund because there is no right way of funding it. Then it is incumbent upon the government to change legislation, and that is where we are at. The government is willing to do that.

It is taking maybe longer, and we are looking at a case where unfortunately there is a health problem. If that health problem had not existed, I wonder if the pressure would have been as great. We have to look at

that. You are saying there may be another 14 cases. How many of these cases have health problems and are extremely urgent? If you have money coming, everything is urgent. The government works slowly, we have to admit that.

In this case, I am pleased to defend the government. We do not like to get involved in this position. There is an element of partisanship from across the way which I heard earlier that I did not like. The government is trying to resolve this problem and correct an inequity that existed, and thank God, is going to come forward now very shortly. It is the unfortunate people who are caught in a system that works slowly to resolve problems. I just wanted to defend our position. Our ministry is working to resolve it.

Mr Carrothers: I just wondered if I could concur with Mr Bell's suggestion. It seems to me that part of the difficulty here is that there has been a change in circumstances. It may well be that the superannuation fund may be able to see its way clear, in the light of pending legislation—by the way, if it is coming in this week, it would mean the legislation is before the House and we are not even talking about possible legislation any more—as it appears it has done in the past, to make this payment.

The difficulty is that perhaps we do not have before us someone who can give that opinion on behalf of the fund. I think if we ask the ministry to go back to the fund and ask that and get back in two weeks, that may very well resolve this within two weeks.

The other difficulties here are surely not going to be settled. There are other impediments, which we seem to be dancing around, that may very well be real. They certainly seem to be real in the mind of the ministry. It may not be necessary to deal with them.

I think Mr Bell's suggestion is a good one and I would suggest that as a committee we recommend that and ask them to go back to the fund and again ask the fund if the fact that legislation which is coming or may well be there by the time they talk to the fund puts the fund in a different position, and we can see a resolution to this.

The Chairman: Do we need a motion? Is anybody opposed to the suggestion by Mr Bell to the ministry?

Mr Cousens: I support it. I have been brought up to date very quickly by my colleagues. The only thing I have a worry on is—I apologize for my lateness—that I would hope we get it resolved. Two weeks from now, where are we going to be? I do not think this House could be sitting at that time and our committee might not be meeting, so we might be talking about an additional two months or something before we have a chance to come back and review it.

Mr Carrothers: It may be that this thing could be resolved without having to come back—

Mr Cousens: I would love it, if we could. It is just that I feel a sense of urgency to it. I think we all do. The two weeks puts us beyond the calendar. There are certain people working in this House to see that we get out of here next week maybe.

Mr Carrothers: Perhaps we could put it on for next week.

Mr Philip: Let's put it on for next week. If it is resolved, we will

accept that in writing. If it is not resolved, we will expect you to come back and answer more questions next week.

Mr Larratt-Smith: All I can say is that we will do the best we can. I do not want to hold out more hope than I should at this stage, as we have had opinions—I think we would like to respond if we can. It is an avenue that makes sense. Mr Bell's argument about looking at the altered circumstances certainly make it worth having another look, but I cannot guarantee the result at this time.

The Chairman: I just want to draw to the attention of the committee that it is a long weekend coming up, the Canada Day weekend. I know there is a short time frame to next Wednesday in terms of working hours. As well, the committee has indicated the urgency of this and its willingness to meet on this next week. We would not be meeting otherwise next week; we would be meeting again on 12 July. So if something has gone astray, will you contact either myself or the clerk?

Mr Larratt-Smith: I think it would be preferable to have until 12 July simply to be able to make sure we have contacted everyone.

Mr Philip: We may not be sitting on the 12th, so would you please do it for next week? That is the request.

Mr Larratt-Smith: We will do the best we can.

The Chairman: Thank you. Is there anything further? We will adjourn the committee until next Wednesday at 10 o'clock.

The committee adjourned at 1154.

STANDING COMMITTEE ON THE OMBUDSMAN

CASE OF MRS H
CASE OF FARM Q

WEDNESDAY 19 JULY 1989

STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Bossy, Maurice L. (Chatham-Kent L)
Bryden, Marion (Beaches-Woodbine NDP)
Carrothers, Douglas A. (Oakville South L)
Cousens, W. Donald (Markham PC)
Henderson, D. James (Etobicoke-Humber L)
LeBourdais, Linda (Etobicoke West L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Substitutions:
Charlton, Brian A. (Hamilton Mountain NDP) for Ms Bryden
Cleary, John C. (Cornwall L) for Mr Bossy

Clerk: Carrozza, Franco

Staff:
Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon
Wilson, Jennifer, Research Officer, Legislative Research Service

Witnesses:

From the Ministry of Education:
Larratt-Smith, Mark, Assistant Deputy Minister, Corporate Planning and Policy Division
Burton, John, Counsel, Legislation Branch

From the Office of the Ombudsman:
Meslin, Eleanor, Ombudsman
Morrison, Gail, Executive Director

LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON THE OMBUDSMAN

Wednesday 19 July 1989

The committee met at 1010 in room 151.

The Chairman: I would like to call the committee to order. Good morning. This is the standing committee on the Ombudsman. We have a number of items on our agenda today. We will be dealing with the Ministry of Education and the denied case of Mrs H, and also the response of the Office of the Ombudsman to the recommendation of the committee on Farm Q.

Although we do not have a quorum in representation by parties, Mr Cousens has authorized us to go ahead, since he is unable to be here for a few minutes yet.

I would like to first read to the committee a letter that we received from Mr Pollock, a long-standing member of this committee. He had an illness a couple of weeks ago and he writes to us and to the Ombudsman:

"Both Jean and I enjoyed the beautiful flower arrangement we received from you during my illness. It made me realize how much I was missing my committee and its members. I look forward to seeing you in the fall. Have a good summer." It is signed "Jim."

We just wanted to know that at least he received our good wishes. I hear he is doing fine and he has even been seen lurking around the Legislature. We hope that he will be well enough to join us when we resume in the fall.

I received a letter from the Ombudsman indicating that there have been some appointments made within the Ombudsman's office for acting positions, given that the Ombudsman is the temporary Ombudsman: Her appointment has been extended to 15 October. Gail Morrison, who was director of investigations, is now in the position of acting executive director. Joy Van Kleef, who was assistant director, social benefits, has been moved to acting director of investigations. Lorna Lampkin, investigator, is now acting assistant director, social benefits.

We hope they enjoy their interim promotions and we congratulate them. We are all very much familiar with the individuals who have been promoted because they have been before the committee a number of times.

Is there anything from the committee before we start the case of Mrs H?

Mr Philip: You might recognize Professor Donald Rowat in the gallery.

The Chairman: Professor Rowat, Carleton University, is in the audience today observing our work. I have been told that he is an expert on the Ombudsman. He will be watching us and telling us what we are doing well or not well.

Mr Philip: Murray Gaunt, a long-time Liberal member of the Legislature, is also visiting in our gallery.

The Chairman: We have a great many visitors. We feel the tension to

perform in excellence today. Since there are no other comments from the committee, could we start with the case of Mrs H? Will the Ministry of Education officials come forward?

CASE OF MRS H
(continued)

The Chairman: We have Mark Larratt-Smith, assistant deputy minister, Ministry of Education, and John Burton, legal counsel for the Ministry of Education.

We have before us also a memo dated 12 July, and attached to that is a letter from the Teachers' Superannuation Commission to the Minister of Education (Mr Ward). Does everybody on the committee have this documentation? Seeing no one complaining that he does not have it—

Mr Larratt-Smith: If people do have it, perhaps it would help if I put those two documents in context and responded to the requests the committee made in its meeting at the end of June.

The Chairman: Okay. I just note that the Office of the Ombudsman does not have a copy of this material.

Ms Meslin: Not of the 12 July letter. We do not have that.

The Chairman: Yes, it was what we have seen before.

Without beginning any arguments or anything, could you just state what the documents are? Then we would like to put it in the committee's context after that, if we could.

Mr Larratt-Smith: Perhaps I should just pick it up from where we had agreed to go at the end of the last meeting. At the counsel's request, we agreed to go back and look at the possibility of the Teachers' Superannuation Commission making a payment to Mrs H at this stage.

The two issues that were raised last time, you will recall, were, first of all, that there is now legislation in the Legislature and whether that would assist in any way, and second, that there was some question around the testimony of the executive director of the Teachers' Superannuation Commission in terms of what the powers of the commission were in circumstances such as this. Those issues are addressed in the letter dated 10 July to the Minister of Education from Mr McArthur.

First of all, that letter deals with the case that he made reference to in his testimony last year when he was asked if there were any other circumstances where a payment had been made in advance of legislation. I think he makes it quite clear that this is a rather different circumstance.

The problem, without getting into it in detail, had to do with the wording of the Teachers' Superannuation Act and in regard to federal legislation and in regard to the Pension Benefits Act and a regulation under that act, both of which were legislation in force.

In effect, Mr McArthur is indicating that that is a rather different situation from the case of Mrs H, where there is not a legal entitlement to pay her under the Teachers' Superannuation Act at the present time. We can explore that further in questioning, if members so wish.

The second issue, which he deals with in the last two paragraphs of page 3 and which we also asked him to comment on, was the possibility of the Teachers' Superannuation Commission making a temporary loan or advance to Mrs H, given the fact that the legislation is in the Legislature, which, when the bill is passed, will provide the authority to the commission to make such a payment. He indicates that there is no ability to do that. That is the first item that was tabled.

The second item really relates to the committee's concern that we explore other possibilities of making some kind of interim payment or loan or advance prior to the legislation's being passed. Mr Charlton, in particular, made some comments about the Ministry of Community and Social Services and its legislation. We explored specifically with them their powers both to make an advance and to assist in this instance. The letter dated 12 July, I believe, if I can find it here, relates to that particular issue.

1020

The problem here is again that Mrs H's case is one where she does not have an entitlement in law at the present time. There is obviously a bill before the Legislature that would change that, but the bill does not grant the entitlement until it is passed. The essence of the advice we have from the Ministry of Community and Social Services is that the advances that are provided for under its legislation only relate to a situation where there is a clear entitlement, rather than where a person is not entitled, as is the current case with Mrs H.

There is a further problem with their legislation which is that their procedure involves taking an assignment against the eventual entitlement, which is not possible under pensions legislation, so that even if this were an entitlement, it would cause difficulties with regard to the pensions legislation.

Those are the two pieces that we tabled. We have explored several other options. As I mentioned to the committee in June, we explored some previously. But we have gone back over every other option that we were aware of. The Minister of Education was particularly concerned that we do that because in his view and certainly in the ministry's view, there is no desire nor any reason to want to try to delay this payment if we can make it. The government is committed to extending the entitlement to persons in Mrs H's category and there is no desire to avoid doing that.

Unfortunately, our review and the best advice we have available to us is really the same as it was at the end of June, which is that there are only two options under which a payment could be made.

One is the route that the government is going, which is through amendment of the Teachers' Superannuation Act, which is before the Legislature and which is intended to come into effect by the beginning of January 1990, presuming it is acted upon by the Legislature.

The other estimates option, as I indicated before, the government has rejected as an option in this case, both for reasons of principle and technical difficulties related to going that route.

Mr Bell: I would like to spend a couple of moments on Mr McArthur's letter to the minister of 10 July. As you have indicated, that is Mr McArthur's current recollection, if you will, of what he was thinking about, I

guess, a year ago when asked if he could think of a circumstance where the commission made a payment to somebody without apparent statutory or regulatory authority.

Just so I am clear, and through me the committee members, is it your understanding that what Mr McArthur is setting forth here is a circumstance where the commission initially believed that because of an amendment to the Canada Pension Plan Act, making people eligible for pensions as of age 60, the commission had to or was required by its legislation to cut back pension benefits as of the same age, ie, age 60—you are nodding your head yes—and that as a result of subsequent discussions, etc, between the commission and the minister, the commission decided, notwithstanding its initial belief, not to cut back pension entitlement to age 60 or as of age 60 but rather to continue the situation, ie, no cutback until age 65, on the understanding that if legislation or regulations were required at some time later the minister would so introduce those in the House?

Mr Larratt-Smith: What you are saying is correct but it is not the entire situation because in fact a regulation was passed under the Pension Benefits Act, 1987 so that the issue, as I understand it, is not one of simply the commission changing its mind as a result of a request from a minister, but has to do with which piece of legislation the Teachers' Superannuation Commission should follow, the Pension Benefits Act, 1987 or the applicable federal legislation.

Mr Bell: We thereby take it that once that regulation was passed, the commission no longer had a concern for the absence of statutory or other legal authority.

Mr Larratt-Smith: I cannot speak for the commission in this regard.

Mr Bell: No, as far as the ministry is concerned.

Mr Larratt-Smith: I can only speak in terms of my understanding of the letter that Mr McArthur has written to the minister, which indicates that under those circumstances the commission was prepared to follow the provincial law rather than the federal law.

Mr Bell: In any event, it is a reverse of the situation we have here. There the situation was a decision by the commission whether to cut back benefits from people who are already entitled and receiving as opposed to the situation here which is the issue of whether an individual can receive benefits, I guess, prior to statutory authority confirming entitlement. Is that your understanding?

Mr Larratt-Smith: Yes. My understanding is they are different circumstances. That is correct.

Mr Bell: As I have described?

Mr Larratt-Smith: Yes, indeed.

Mr Bell: I think this is going to come up and I want, if I can, to telescope matters.

You indicated last time you were here that when the legislation as currently before the House is passed, this individual Mrs H would be entitled and would thereafter receive benefits.

Mr Larratt-Smith: Yes. Section 68, I believe it is, of the bill that is before the Legislature would provide the authority for the commission to make a payment to persons in Mrs H's situation.

Mr Bell: I am not sure that this was not covered off but I want to make sure it is. Can you confirm that the eligibility of Mrs H would be retroactive to the date reflected in the Ombudsman's report, but in any event retroactive to a date of some prior years?

Mr Larratt-Smith: Without checking, I would have to verify the date in the Ombudsman's report. What the legislation provides is, if you have the legislation before you—I do not know if members do. Is it possible to obtain or would the committee prefer if I just read the subsection? It is subsection 68(3).

Mr Bell: You might hold on. Members, in the material that was distributed, it is the very last document. Subsection 68(3).

Mr Larratt-Smith: The provision is subsection 68(3) at the top of page 35 which speaks to a survivor pension calculated from the date of a written inquiry respecting a survivor pension.

1030

Mr Bell: I understand your reluctance to be pinned down, and I do not want you to be, because I am not sure what that date is, but we can put some general specifics on it.

Mr Larratt-Smith: My understanding, just to try to be as helpful to the committee as possible—and this is indirect information and I have not seen it in writing—is that she first made a written inquiry of the commission on this subject in the same month or very shortly after her husband died.

Mr Bell: If we assume that to be true—let's assume it as a hypothetical for a moment—that Mrs H did make an inquiry in written form to the commission on or before 31 December 1989, then upon the passage of this bill her entitlement to benefits is as of the date of that written inquiry.

Mr Larratt-Smith: That is the intention of the legislation.

Mr Philip: I was not quite sure about your comment on the possibility of giving the loan with powers of retrieval. You said you could not put what would amount to a lien on a future pension. Is that correct?

Mr Larratt-Smith: That is my understanding of the legislation under which the Ministry of Community and Social Services extends these kinds of benefits, which was the reference Mr Charlton was making at the previous session.

Mr Philip: I used the word "lien"; probably a more correct word is "assignment."

Mr Larratt-Smith: "Assignment" is, I believe, the word.

Mr Philip: Whereas you can assign the future benefits under family benefits, you cannot assign—

Mr Larratt-Smith: A pension benefit.

Mr Philip: —a pension under this particular pension plan, or under any pension plan in Ontario?

Mr Larratt-Smith: I believe it is under the act. John, do you want to speak to that?

Mr Burton: The Pension Benefits Act prohibits the assignment of a pension benefit. Our current Teachers' Superannuation Act prohibits the assignment of a pension benefit as well.

Mr Philip: One would assume, though, that if you cannot assign the pension you could assign at least a loan. You could make a simple loan, could you not?

Mr Larratt-Smith: No.

Mr Philip: Why?

Mr Burton: There is no statutory authority for a loan to be made out of the pension fund by the commission. It would be a breach of their obligations to the beneficiaries if they made that sort of use of the pension fund.

Mr Carrothers: I think we are going to go over territory we went over the last time. While I can understand there is no authority in the commission to make a loan, and I can understand that you cannot assign a pension, what would stop the ministry from making a loan and taking a personal obligation from Mrs H to pay back an amount equal to the pension benefit when paid?

Mr Larratt-Smith: We did explore that option as well, and we do not have the authority to do that. We looked at several possible routes: a payment by the Minister of Education (Mr Ward), a payment under the Community and Social Services legislation, as we have discussed, and a payment under the Financial Administration Act. We even looked at the whole concept of the royal prerogative of mercy as a concept for payment in this regard.

Our advice was that none of those would be appropriately used in the circumstances, particularly because we are dealing with a case that relates to someone who does not have an entitlement at this time. The advice we have received is that really the only way of making a special payment would be through the estimates process.

Mr Carrothers: There is no discretionary spending authority in the minister's hands?

Mr Larratt-Smith: Not for an item of this kind. There certainly is discretionary expenditure but not for an item of this kind.

Mr Carrothers: What makes this item special? Why could it not just be considered a discretionary expenditure by the minister? I guess I have some difficulty. That is why I am asking that question. What is special about this?

Mr Larratt-Smith: The minister gets his discretionary authority through legislation, through the Education Act in particular, and the Education Act does not contemplate making grants of this kind.

Mr Carrothers: But it contemplates making expenditures presumably in relation to education or something, does it?

Mr Larratt-Smith: Yes.

Mr Carrothers: It must be fairly broadly stated. This does not fit within that?

Mr Larratt-Smith: This does not fit within that particular parameter.

Mr Carrothers: I assume things like furniture and what not would fall within the minister's discretionary spending ability; that is shifting into administrative needs. I wonder why something to the spouse of a former teacher, which that spouse is going to become entitled to fairly shortly by legislation, could not fall within a general discretionary authority similar to other expenditures the minister must make on a day-to-day basis.

Mr Larratt-Smith: I appreciate the general thrust of your question, but the fact is that our review of the minister's power is that he does not have the power to make this kind of grant or loan to an individual.

The Chairman: Does the Ombudsman's office have any comments?

Ms Morrison: I do not think we have anything further to add.

The Chairman: I would like some direction from the committee as to how we should proceed on this.

Mr Philip: I just do not accept the ministry's statement. It is a matter of will, not a matter of means. You could have a one-line item in your estimates; you are just not willing to do it. Is that not the case?

Mr Larratt-Smith: We could have a one-line item in the estimates. That is a possible way of doing it. It poses, as I indicated to the committee last time, a number of rather severe technical problems, one being whether you then try to recover that money from Mrs H or whether you would have to amend the legislation to change the date of entitlement so that she was not, in the end, paid twice.

The more serious technical problem is how you would handle, through a line in the estimates, payments to other persons in the same circumstances so as to be fair to them, without knowing necessarily who they all are and what all their entitlements are. Those are the technical difficulties.

Mr Philip: But surely the only people you would pay would be those who had requested payment, and you would know who those people were because you would have received a request.

Mr Larratt-Smith: Yes, but the working out of the entitlement is a more complicated matter than simply indicating a desire to be considered.

Mr Philip: If you could work out the entitlement for Mrs H, why could you not work it out for five or six Mrs Hs?

Mr Larratt-Smith: My point is that the identification and the working out of that are a complex matter. I was going to go on to indicate to you that the fundmental problem with that route is not just that it is technically difficult, but that the government has indicated it is not prepared to go in this direction with a supplementary estimate because of the principle of paying out of the consolidated revenue fund, given the other principles involved in this case and the fact that there is legislation before the Legislature which would resolve this matter. So it is not a matter of being unwilling to resolve it in any way. The issue is simply one of timing.

Mr Philip: One last comment: You say the identification is difficult. We have just said that the only people we would contemplate would be those who have announced themselves by way of asking for it, anyway. The identification issue is no longer an issue, in my opinion.

You say it is technically difficult to calculate, but you can calculate one technically and somehow feel that you cannot calculate more than one. Therefore, I do not really accept that argument.

1040

Then you are down to your last argument, which is that the government is not willing to move or the ministry is not willing to move. That is really the bottom line, is it not? It is not that you cannot identify them, because you will know the ones who have written to you. It is not that it is technically impossible, because if it is technically possible to calculate for Mrs H, it is technically possible to calculate for five or six or more other people. The bottom line is that the government just does not have the will to move on this, does it?

Mr Larratt-Smith: The bottom line is that there is a fundamental principle related to the payment of individuals out of the consolidated revenue fund in cases where there is no entitlement in law at this time and in cases where the government has taken the initiative to amend pensions legislation so that the pensions fund, which is the proper source of payments for these individuals, can make the payment.

Mr Philip: On this violation of this principle, have you sought an opinion from someone, such as the Provincial Auditor, to find out whether he would have any technical objections in principle to the payment in this form, considering the fact that this person is entitled, or will be entitled once the legislation is passed, and there are simply humanitarian reasons as to why she should be paid now?

Mr Larratt-Smith: To my recollection, we have not asked that specific question of the Provincial Auditor. I am not aware of having done so.

But I would just return to you that you mentioned "is entitled or is about to become entitled." Our difficulty is that there is a real distinction between those two phrases. The fact is Mrs H and the persons in her category are not entitled at the moment and will only become entitled when the legislation is passed.

Mr Charlton: Perhaps you could explain to us—

The Chairman: Mr Charlton, I have someone on the list ahead of you, if you do not mind.

Mr Lupusella: I think you can raise the question, because I would like to move a motion. If he has further questions, I think it is appropriate for him to do so.

Mr Charlton: Also, my question is supplementary to the issue that was being discussed here.

The Chairman: I will tell you where the confusion arose. I found no further questions from the committee when I asked, and then I said I would like suggestions on where we go from here. I think that is where Mr Lupusella

is coming from now. Then we proceeded to ask more questions, which have been very good questions. I wonder if it might be appropriate for the one question from Mr Charlton to come forward; actually, Mr Bell did ask for one more opportunity to question. Then can we have the motion at that point? Would that be appropriate?

Mr Lupusella: No problem.

Mr Charlton: Perhaps just in legal terms, in terms of how the legal advice you are getting is explaining the legal difference between an entitlement and "about to become entitled" in the case of a benefit to be paid out, and the Ministry of Revenue's interpretation of the same question when it comes to collecting taxes where no legislative authority exists but is pending, you can somehow bring together for us the different interpretation that is applied in these two cases.

Mr Larratt-Smith: I am not sure I would want to undertake to do so. I would presume that there is general legislation under which the Ministry of Revenue operates in those circumstances. John, are you familiar with that at all? I think we are probably getting way out of our own depth here and it would be a matter of going back and consulting experts in that area. I would like to be helpful.

Mr Burton: If I can offer some assistance, the principle on which the Minister of Revenue starts to collect taxes once a budget is introduced changing the taxes but before the budget bills are passed is that the budget bills will retroactively authorize.

Mr Charlton: We are not talking about principles here, we are talking about legal authorities. That is the position you put to us in terms of being able to pay out a benefit with no legal authority.

Mr Burton: The legal principle on which the Minister of Revenue operates is that he is going to be given the retroactive authority and also that in the tabling process, that in itself is authority. If an estimate were submitted in this case or in a similar case, it would be proper parliamentary procedure to make the payment before in fact that estimate was passed by the House, but there has to be--

Mr Charlton: The tax begins to be collected before the estimate is tabled.

Mr Burton: It begins when the budget is tabled.

Mr Charlton: Often before the bill is even tabled.

M Burton: That is correct. It begins when the budget is tabled.

Mr Charlton: It begins when the budget is read.

Mr Burton: That is right.

Mr Charlton: Or carried anyway. Not always.

Mr Burton: There has to be something before the House; that is the point.

Mr Bell: Can I make some suggestions? I think, speaking for myself,

the ministry has shown extraordinary diligence over the years in trying to find a way. As a lawyer, I understand that you perceive you are up against the roadblock of the law or a lack of authority, I guess, in making the payment.

My strong sense is, though, that the ministry still has a very strong will to see this lady accommodated and—let's remind ourselves why we are here—to implement the committee's recommendation and, through it, the Ombudsman's recommendation. Can I suggest a couple ways to you, sir? If they are of interest to the committee, you might confer and advise us on some time frame.

I have some knowledge of the Education Act and how it works. The courts have generally applied a fairly wide interpretation to not only the powers of boards of education but the powers of the ministry. When you consider that this is effectively part of the legislative process, that we are a standing committee and, through it, one of its servants of the Legislature—the Ombudsman—there may well be a way if the will is present.

If this were 31 December, we would not have the concern we have today. Again, let's remind ourselves why the level of concern is so high. We have an elderly person with disabilities and no apparent family support or other means of support who is in some urgent need of assistance. I think that is even acknowledged by the ministry. I do not think we are talking about all the money here. I have heard various figures about what the quantification of the retroactive amount is. I think we are talking about something between now and the end of the year or when the legislation is passed. I do not know what that amount is, but I do not think it approaches half of the amount of entitlement we are thinking about.

Would the ministry consider standing behind a bank loan or a fixed amount to be repaid upon direction as and when the entitlement is vested when the legislation is passed? As I understand your act, I do not think you have to go to cabinet, I do not think you have to go to the Board of Internal Economy, I do not think you have to go to estimates to get authority for that. I think the minister has fairly wide authority if, in appropriate circumstances, it is considered to be in the public interest or the best interests of the circumstances.

I think it is very clean and, with the ministry standing behind such a situation, I do not think you would have trouble getting an accommodation from a lending institution. If this is a viable alternative, I would want, if the committee concurs, the Ombudsman to be a fixed part of this arrangement, at least in terms of ensuring that the process is implemented appropriately from the complainant's side. That is one suggestion.

There is another suggestion. It may require your legal advisers to go back again and consider the law, but what we have here is a recommendation of a standing committee of the House that has yet to be debated in the House but nevertheless has some standing and status. It is a committee of the Legislature asking the ministry to accommodate this recommendation. Obviously, it is being asked to accommodate it on a temporary basis. Again, I do not see—we are talking about from between 19 July to the end of the year—all of the retroactive money for entitlement. I think we are talking about an amount to permit this person to have her circumstances ameliorated for the short period of time until the entitlement is vested.

Madam Chairman, those are my two suggestions. I give them to the ministry for comment and consideration as it, or you, may consider appropriate.

The Chairman: I do not know if the Ministry of Education is prepared to respond at this time.

1050

Mr Larratt-Smith: May I just ask one question of clarification? The first one was that there be a bank loan guaranteed by the ministry. The second was that it be for part of the amount?

Mr Bell: No, that is part of it. I think what you may have to do is sit down with the Ombudsman and work out a figure. I do not want to put on the record any figures that I have heard, but I think you are—

Mr Larratt-Smith: I just wanted to be clear on the second half of your question.

Mr Bell: Yes.

Mr Larratt-Smith: Or the second point you were making. Was it that the Ombudsman be involved?

Mr Bell: No, that is not my second point. Part of the entitlement runs through both of the suggestions. Whatever device we try to identify on a nonlegal basis, or specifically avoiding the concern of absence or presence of ministerial authority to pay moneys in respect of which there have not been budgets, estimates or whatever, we are not asking in a direct way for any moneys to be advanced by this ministry on suggestion 1.

All we are asking is that the ministry take such steps, with the assistance and participation of the Ombudsman's office and anybody else who wants to become involved, to persuade a lending institution to advance moneys until such time as eligibility is vested by the legislation. It would seem to me that you may be talking about a period of less than six months. I would consider, in terms of amounts, that you are talking about 25 per cent of the entitlement, if the entitlement is the five figures that I have heard. That is suggestion 1.

Suggestion 2 does get into the question of ministerial authority. I guess what I am asking you and your legal advisers to do under that second scenario is to look very hard at why we are here, and that is to consider implementing a recommendation of a standing committee of the Legislature, whose recommendations have historically been adopted by the House. It is a recommendation which effectively supports a recommendation of the Ombudsman and I would think that there is room for some consideration. The first scenario is a lot easier than the second, to me, because in the first you do not address, or have to address, this expenditure authority. Has that clarified your concern?

Mr Larratt-Smith: Yes, thank you. With regard to the second, I do not believe there is much I can say that has not already been said. The legal reality, as I understand it, irrespective of what may occur within the Legislature or one of its committees, is that this lady and others in her category are excluded from benefit, are not entitled to the benefit until the act is amended. So that one would appear, from everything we have been through and gone back around, as I was indicating in my opening remarks, since the last meeting of the committee, to be a dead end.

Mr Bell: That second scenario does not directly address the presence

or absence of legislation. You would have to assume that when this recommendation is debated by the House, and it has yet to be, it will be adopted. I think the consideration for the ministry, not confined to legal issues, is what obligation, if any, exists and is imposed on the minister to implement a recommendation directed to the minister that has been adopted by the Legislature.

As I say, that one is more difficult than the first one which is why I prefer, frankly, the first suggestion. I should tell you there has been a debate involving the Legislature, committee counsel, attorneys general and others about what, in fact, has been created when the Legislature adopts a recommendation of this committee. It is a debate which means there are both sides to the issue. Again, I guess it depends on who is looking at it as to whether a legal authority is readily determinable or questionable.

Mr Larratt-Smith: I think I would not want to venture further into that particular debate. With regard to the first suggestion you made, again I feel somewhat caught because we would like to be as helpful as we can. We have, with the best will in the world, looked to any way we could act. We have come up with no way of doing it short of the estimates process which, because of the principles and technical issues involved—and I appreciate Mr Philip has some problems with the technical issues—the government is not prepared to use in this instance.

In the case of the specific suggestion, my first reaction would be that there are legal responsibilities in guaranteeing a loan as much as there are in advancing a loan and that that imposes legal limitations and questions of authority in the same manner. As a specific suggestion, I would be quite happy to take that back and take a look at it, but it is not as if we have not been over this ground in a general way and in a substantive way in our own search to look for ways in which this situation might be dealt with.

Mr Lupusella: I think we have exhausted any kind of argument. I am very satisfied with the explanations that have been brought before this committee by ministry officials. I think that the point which was supposed to be determined was whether or not Mrs H was eligible under the law to receive certain benefits. It was very clear from the ministry officials' presentations that she is not eligible until the new law is passed by the Legislature. In view of that, if I may, I would like to move a motion.

The Chairman: Mr Lupusella moves that no further action will be taken by this committee in relation to the case of Mrs H, in view of the fact that the law is presently before the House.

Mr Charlton: Madam Chairman, I think you are going to have to find Mr Lupusella's motion out of order, first, because the issue before this committee was never a question about whether or not she was eligible. The committee knew right from the outset that she was not eligible under the existing legislation. The committee found that was unfair and that she should have been eligible.

That has been the issue before this committee, not the issue of whether or not she was eligible under the legislation, as you put in your motion. That is not the issue before this committee. It does not deal with the matter that the committee has been dealing with.

The Chairman: Perhaps, Mr Lupusella, you could amend your motion to say "no further action". That would be the motion, with no explanation. I

think that would be in order because it would stand the way we have it and it would be debated in the Legislature, according to our recommendations. Would that be an appropriate motion?

Mr Lupusella: Yes.

The Chairman: Mr Lupusella moves that no further action will be taken by this committee in relation to the case of Mrs H.

Are there any other comments before we take a vote on that particular motion?

Mr Philip: I just want to express my grave disagreement with Mr Lupusella. I think this ministry has shown an insensitivity in this case, a lack of will to deal with it because it does have a method of dealing with it and I think in some ways is contemptuous not only of this committee's wishes but also of the Ombudsman. I certainly will vote against this motion.

1100

Mrs LeBourdais: I just have one further suggestion to put forward as a last-ditch effort, if you will. I realize Mr Lupusella has a motion on the floor. May I make a comment as to what I see as perhaps one other possible solution?

Mr Carrothers: Why not?

The Chairman: Why not is my version but I am sure that is not an appropriate technical procedure. There would also be—if Mr Lupusella has no opposition to that suggestion. You could certainly present it as an amendment.

Mrs LeBourdais: You have to keep it in line with the motion, do you not?

Mr Charlton: There is no problem with Mrs LeBourdais putting her position for opposing his motion.

The Chairman: Nobody has objected to your proposal.

Mrs LeBourdais: Do not make this too complex.

If I may draw an analogy, if I was fortunate enough to win an Ontario lottery, but for some logistical reasons I could not receive the money until January and I went to the bank and said: "Here is my winning ticket. Wintario agrees that this is the winning ticket. I will get my money in January." I think I could get a bank loan on that basis. Again, I do not have the actual figure we are talking about and I do not know how substantial an amount we are talking about.

But if we could make the analogy that in this case the legislation could be the winning lottery ticket, it is my understanding that you could not guarantee repayment on behalf of the ministry to the bank because you do not have any guidelines that allow you to do that, but you could pay that out of general revenues.

Mrs H would definitely have to be the person who repaid the loan but if some understanding perhaps in writing from her that she would repay that loan that you would guarantee between now and January, is that something you feel you could do?

Mr Larratt-Smith: If I may respond, it really is the same question that Mr Bell was posing.

Mrs LeBourdais: But you would not be asked to repay it. Mrs H would repay it. But you could just verify positively that money is coming.

Mr Larratt-Smith: I understand that. The difficulty is that there is still a difference between the situation of a lottery ticket which is, presumably in your analogy, a winning lottery ticket and hence the entitlement has been established by that lottery ticket. It is simply deferred until a later date.

Mrs LeBourdais: Are you not telling us that entitlement is coming?

Mr Larratt-Smith: Yes, but I am saying that entitlement is not there.

Mrs LeBourdais: That is okay.

Mr Larratt-Smith: There is no entitlement at the moment. I suppose one could at least hypothetically see that this law might not be passed or passed within the time frame or might be amended. There are all kinds of possibilities which would not exist in your lottery ticket analogy.

The other implication of guaranteeing a loan, which as I pointed out to Mr Bell does have legal consequences, is that of course the essence of guaranteeing a loan is that if there should be a default then you have to have the ability to pay under those circumstances.

That does raise again the issue of the minister's ability to place himself legally in such a position. That is the issue we have investigated pretty thoroughly.

Mrs LeBourdais: You tell us, and I believe you, that you have sincerely attempted to do something. We are, in a sense, negotiating. You have to give us something. Where is the give? You have to give us something. We have come up with a few alternatives that are pretty close to being favourable, I think something that is pretty close to something that you can live with, give us a tangible indication of your will.

We are getting closer. We are just saying it has to be part of the money. It has to be short-term. You do not have to pay it back, she does. You give us something. Give us an indication of that will.

Mr Larratt-Smith: I wish it were that simple.

Mrs LeBourdais: If the bank were willing to go along with it, could you?

Mr Larratt-Smith: The issue is not, presumably, whether if Mrs H were to go to the bank tomorrow and say: "Look, I have a situation where there is legislation before the Legislature. There is a great deal of evidence available and a committee of the Legislature which indicates the will of that Legislature. I have an indication from the government through testimony before that committee as to what the intentions are and the legislation itself"—it would be open for her, I suppose, to make that case. Not being trained in banking, I would not know how a bank might respond to it.

The difficulty comes in the ministry taking a position of guaranteeing

such a situation. I have indicated to Mr Bell that we will look at that specific request, but I am not optimistic, given the fact that the question the minister has essentially posed is, is there any way that we are aware of that we can do this particular thing in the meantime? The answer that we have had has been no.

Under those circumstances, it is very difficult to negotiate, because I do not have anything to negotiate with.

Mrs LeBourdais: In effect, because there is no present entitlement and because we have based a lot on that fact, we have been talking that it is a fait accompli as of January. We are saying she just cannot have it now. But now you are saying to me that just on that off chance that something goes afoul and the legislation does not come through, then you then would have no guidelines to pay back in any way. There is a little bit of an "if" that creeps into it.

Mr Larratt-Smith: Again, any piece of legislation before the Legislature depends on the Legislature's having finally voted on it.

Mrs LeBourdais: If it did not, in effect, go through in January, then we would be back here again. "What do we do with Mrs H? The legislation did not get passed." Would we start all over again?

Mr Larratt-Smith: Until the legislation is passed, Mrs H is not entitled to a benefit under the Pension Benefits Act. That is the fundamental problem.

I might just make one further comment. It is not our desire to be negotiating this one, because I do not think we see ourselves as being on the other side.

Mrs LeBourdais: I appreciate what you are saying, but we are down to that.

The Chairman: Is there an amendment to the motion, Mrs LeBourdais?

Mrs LeBourdais: No.

The Chairman: The motion on the table is that no further action be taken on this, other than what was in our report that has been tabled in the Legislature.

Mr Carrothers: Just to refresh my memory, what was our report?

The Chairman: We had several, but I think the main one was:

"That the Minister of Education, in conjunction with any other governmental organization he deems necessary, issue an ex gratia payment to Mrs H as soon as possible, effective from the first day of the month following the date of her inquiry for same, until the amended provision is in force. Such payment can be made through the annual budgetary process, so that no question will arise as to the authority of the ministry to make payments;

"and, That the Minister of Education, in conjunction with any other governmental organization he deems necessary, make spousal payments to any other surviving spouses who has been denied a full dependent or survivor allowance by the Teachers' Superannuation Act or the Teachers' Superannuation

Act, 1983, payable from the first day of the month following the date of their request for a benefit as a result of this recommendation."

That was the recommendation of the committee. It has been tabled in the Legislature. It has not been debated. What it means is that by the time we debate it, the legislation will probably be in force, and then she will get paid in January when the legislation is in force. That is as I understand it. Is that what you understand by your motion, Mr Lupusella?

Any other comments on the motion? All those in favour of the motion—

1110

Mr Charlton: I have just one other comment. It seems to me that the ministry representatives have just responded that they are prepared to look at two suggestions that were put to them, which this committee may then want to deal with, depending on their response.

The Chairman: Gee, my little old ears did not hear that. Did the Ministry of Education people say something to that effect, that you wanted to go back and look at the two suggestions that were made, or three?

Mr Charlton: They did say they were not very hopeful, but they said they would look into both of the suggestions, as I understood it.

Mr Larratt-Smith: I indicated that we would look at the first of Mr Bell's suggestions, which Ms LeBourdais was also making, but that I had no real hope, given the general approach, that we would find something that we have been looking for already.

The Chairman: May I make a suggestion that we get them to pursue that? However, we probably will not be meeting now again until our dates, which are yet to be determined. We can invite that request, but I just still—we have a motion on the table.

Mr Charlton: I would suggest that Mr Lupusella's motion would preclude this committee taking any further action.

Mr Lupusella: No, no. I have a further recommendation. We can vote on the motion and, in the meantime, the ministry officials will communicate their position on Mr Bell's recommendations to the chairperson of this committee.

Mr Philip: I have a question then. If that is the case, then the chairperson of this committee, representing the committee, is taking some action in receiving the information and therefore would be in violation of Mr Lupusella's motion, if carried.

Furthermore, since it is the practice of the chairperson of this and other committees to share correspondence with members of the committee, then each and every one of us, in reading that correspondence, would be in violation of Mr Lupusella's motion.

I find it very difficult to understand how we can possibly pass a motion while at the same time accepting that we are going to get more information, because the very reading of that further information suggests that we are taking some action.

The Chairman: I am prepared to still let your motion stand and vote on it, or to table it, at your suggestion.

Mr Lupusella: I think we should vote on the motion. Also, this committee has to be realistic in analysing the content of Mrs H and the position taken by the Ministry of Education officials. Even though there are great reservations on the two proposals that have been suggested by our counsel, Mr Bell, I think that for the sake of being expedient on the issue of this case, we should vote on the motion without wasting time.

The Chairman: And the motion was?

Mr Lupusella: Not to take any further action.

The Chairman: Just a moment, the clerk has a point. The clerk has an excellent idea. Since the motion really is that the recommendations as they stood, which invited comments from the ministry, will still stand, we will still be able to invite correspondence from the ministry.

Do you read that as I do, Mr Philip? The motion is that we do not do anything further than what we have already done, which are the recommendations and our report, which was tabled in the House.

Mr Philip: No, that is not—

Mr Charlton: My interpretation of that motion—

Mr Philip: Mr Lupusella's motion was that no further action be taken. However, we have passed a resolution which is part of our report that suggests that you and members of the committee have an obligation of tabling in the House a recommendation which in fact tells the ministry to pay the money.

Therefore, if Mr Lupusella's motion carries, my interpretation of that motion, and I ask for your opinion on this, would be that: (1) You could not receive information and distribute it from the ministry on this topic; and (2) you would have difficulty in tabling a report containing a motion that was already passed because that in fact would be taking further action on this.

Mr Bell: Forgive me, Mr Lupusella. It is probably better to ask you what you meant by your motion, but I took your motion to be against the background of the committee's recommendations in the reports, which have already been sent to the House. It was not intended by your motion to preclude this committee or that legislative process at all, that the motion that no further steps be taken be in the context of the discussion had today with the Ministry of Education on the two issues that are up for discussion, because if your motion is intended to be an all-encompassing one as interpreted by Mr Philip, I would have great concern and perhaps the committee might even lack jurisdiction to entertain such a motion since it totally undoes that which has been already formalized.

Mr Lupusella: My motion, which is before this committee, has been the result of all the actions that have been suggested by the committee previously, all the recommendations that have been formulated by the committee previously, and those are the result of two presentations, which had been made before this committee by Ministry of Education officials. I feel quite satisfied at this point in time that we exhausted all the resources in the case of Mrs H as to whether or not payment could have been made by the Minister of Education in the form of an ex gratia payment or other ways or other methods, which the Minister of Education would have the power to do.

We heard that Mrs H does not have legal entitlement under the law for

the Minister of Education to make any kind of a payment to her. Therefore, I think my motion is the final conclusion that no further action would be taken by this committee because there is legislation before the House. At that time, as Ministry of Education officials have stated, when the law will be passed, Mrs H would be entitled under the law and at that time she would receive the payment.

If we want to waste further time on this issue, by all means go ahead with that. I am not prepared to do so.

The Chairman: Mr Lupusella, you are not changing our original report, which we tabled in the Legislature? You are just making a motion that no further action be taken?

Mr Philip: That is not clear at all.

Mr Charlton: May I speak to the motion?

The Chairman: My only problem with it is that I have called the vote. You need consent of the whole committee to speak to the motion again. I would like to remind you that it is now 11:17. I realize it is not clear. I understand Mr Lupusella, unless he objects, means that at this point we have tabled in the Legislature a report which makes the recommendations I have read out.

What has happened in effect is that the Minister of Education, as I understand it, is not willing to make an ex gratia payment, although we put it in our report, but the report has not been debated in the Legislature. It is still at the Legislature. If indeed we get a chance to debate our report before the implementation of this legislation, something may or will be done. In that event, what Mr Lupusella is saying is that we take no further action.

Mr Charlton: Mr Lupusella's motion is unnecessary. Unless the committee comes up with an alternative that has not yet been explored, we have nothing further to do on the issue anyway. If we come up with an issue that has not already been explored, then his motion will preclude us considering it.

The Chairman: That is exactly what Mr Lupusella is saying.

Mr Lupusella: Exactly the point. There is nothing else that you can do. You have to face such reality.

Mrs LeBourdais: Based on what Mr Charlton is saying, if Mr Lupusella's motion is not necessary and you do not have to call the vote on it, then I do have a motion to put forward, which I feel might again allow this window to open.

Mr Philip: You will have to have him withdraw his motion.

The Chairman: My understanding would be that we would defeat Mr Lupusella's motion if you have an alternative motion.

Mr Charlton: Put the question and let's get it over with.

Mr Carrothers: We are not paid by the word, so let's put the motion.

The Chairman: Do you understand? If we defeat Mr Lupusella's motion, you will have an opportunity to put a motion before us.

Mrs LeBourdais: I realize that.

1120

Mr Philip: Madam Chairman, I have a series of questions to ask you.

Motion negatived.

The Chairman: Mrs LeBourdais moves that we ask the Ombudsman committee to approach a bank and explore the possibility of its making a loan to Mrs H and report back to this committee.

Mr Charlton: Why do we not have the chairman of the committee do that?

The Chairman: I understood your motion to be that the Ombudsman approach a financial institution.

Mrs Meslin: Did she say the Ombudsman or the Ombudsman committee?

The Chairman: The Ombudsman.

Clerk of the Committee: Ombudsman committee.

The Chairman: Yes, Ombudsman: that the Ombudsman approach a financial institution and try to facilitate in some manner a loan for Mrs H.

Mrs LeBourdais: See if it would be feasible.

The Chairman: If it is feasible, yes. Just if it is feasible and report back to the committee?

Mrs LeBourdais: Yes.

Mr Philip: I have a question for the Ombudsman on that. Do we have any indication that this would in any way assist this person? Obviously, she is going to have to pay interest on a loan like that. I do not know her particular situation. I find it difficult to vote for a motion like this when I do not know the individual. I do not know her individual circumstances. I know her age and her health, but that is about all I do know from the information that has been provided.

Mrs Meslin: She already has a mortgage. She is in poor health, but more important than that is that we do not even have the bill. It is not our bill to go before any kind of lending institution to use as collateral. Unless you want us to go around the office and ask people if they want to mortgage their houses to do this, I have no idea how a bank would look at the Ombudsman coming to it with this situation.

Mrs LeBourdais: Can I try another way? Would it be feasible for the Ministry of Education, based on the impending legislation, to make that same inquiry of a bank?

Mr Larratt-Smith: I think that is really the question we have already been discussing.

The Chairman: If you could put the motion forward, we can vote on it and they can come back and tell us whether they have been able to do it or not.

Mrs LeBourdais: I so do.

The Chairman: Does everybody understand the motion? Maybe Mrs LeBourdais would rephrase it for us, given that it has changed a bit.

Mrs LeBourdais moves that the Ministry of Education speak to a financial institution to see if a loan would be possible for Mrs H, based on the impending legislation.

Motion agreed to.

The Chairman: I am sorry. I think the chair has lost all control of her own responses, but I thank you. If you have understood what it was—I think what we can do is while we are just shifting around—we will deal next with the case of Farm Q. We thank you for coming and we will provide you with the answers.

## CASE OF FARM Q

The Chairman: Next we are dealing with item 2 on your agenda, which is the Office of the Ombudsman's response to the recommendation of the committee on Farm Q.

Maybe we could just refresh the committee on what our recommendation was. I do not believe I have the exact wording. Here it is. The recommendation on Farm Q was as follows. The chairman started by saying we were "advised by the Ombudsman that the parties have been unable to agree on an adversarial process for the determination of this matter.

"After reconvening and hearing submissions from the Ombudsman's office and the Ministry of Agriculture and Food, the committee has decided and so recommends:

"That the adversarial process to determine the issues between the complainant and the Ministry of Agriculture and Food should be the judicial process by the commencement of an action in the Supreme Court of Ontario.

"The complainant's reasonable legal costs, which shall be borne by the Ombudsman unless the Ombudsman considers it unnecessary, such legal costs, if paid, to be included in the Ombudsman's next or subsequent estimates."

We also asked that the parties proceed as expeditiously as possible.

For the committee members who were here, you will recollect that Michael Zacks, who is the legal counsel for the Ombudsman's office, made a response to our recommendation, a response which he did not have an opportunity to research, but on his first opportunity he was concerned whether the Ombudsman's office had the ability to implement the recommendation which we set forth at that meeting.

The Ombudsman has now come back with a response to our recommendation, and I am sorry, I know you were here last week and had it prepared for last week, but we are prepared to hear it today. All of the committee members should have before them a copy of the remarks that Mrs Meslin will be making. Please proceed.

Mrs Meslin: I appreciate the time you have given me to consider your recommendation in the case of Farm Q. It is a recommendation without precedent in the history of the Ombudsman's office, and as you may have noted, took me by surprise.

I have considered your recommendation in terms of its effect on Farm Q, on the role of the Ombudsman and on the impact it would have on future complainants. My immediate reaction to the recommendation was extremely negative. It is contrary to the very essence of an Ombudsman. My staff and I are convinced that your recommendation, if implemented, will do major harm to the effectiveness of the Ombudsman and is beyond the Ombudsman's jurisdiction. However, I recognize that the Ombudsman is an officer of the Legislature and I believe she is obliged to follow its recommendations as long as those recommendations do not impede the Ombudsman's independence and are compatible with the Ombudsman Act.

1130

The Ombudsman is an impartial fact-finder empowered to make recommendations about governmental maladministration. Her only power is through moral suasion and by publicly reporting to the Legislature through the annual and special reports. The Ombudsman's success flows from the fact that her process is informal, nonadversarial and, most important, recommendatory. Government recognizes that the Ombudsman is impartial and independent and that her decisions are evenhanded and based on evidence.

If the government sees that the Ombudsman's recommendations can be ignored or sent to court, I believe that the degree of co-operation that we currently enjoy in the majority of investigations will evaporate and we will be engaged in an adversarial process. We will lose co-operation, we will lose our ability to effectively conciliate complaints and, ultimately, we will lose our usefulness. I do not believe this fear is alarmist or exaggerated. It is a sincerely held belief based on our experience and understanding of the Ombudsman's role in the administration of justice.

I believe your recommendation will also diminish the effectiveness of your role in the overall Ombudsman process. The involvement of the standing committee on the Ombudsman in our process is unique in Canada. The committee's review of our reports, after hearing representations by the governmental organization and the Ombudsman on the merits of the complaint, has significantly helped us in resolving complaints. This is evidenced by the fact that very few recommendation-denied cases are brought to the committee.

By not deciding the merits of the issue put before you in the Ombudsman's report and by referring the issue to the court, the incentive for government to compromise with the Ombudsman is removed. Your recommendation negates the efforts of my staff in conducting a very lengthy and detailed investigation on Farm Q's complaint. It is not only demoralizing for them but also for the legitimate expectations of Farm Q, which chose to have this matter decided in an Ombudsman process, not in the courts.

The committee, by acting as a nonpolitical forum of review and having time and again given its support to the Ombudsman, has assisted in encouraging government to resolve many complaints without having to take them through the time-consuming and meticulous process of reviewing recommendation-denied cases at the committee stage.

The committee's review is much more significant, in my view, to proper government administration than the courts are. The courts cannot deal with the numerous complaints of maladministration that the Ombudsman must investigate. The courts' scope of review of government maladministration is much narrower than the Ombudsman's; it is legalistic and technical and limited to issues of law. The Ombudsman process, on the other hand, is wide in scope and focuses on questions of fairness in its broadest sense.

Your recommendation greatly undermines this process and diminishes the consistency and predictability that both the Ombudsman and the government have come to anticipate and expect.

The duplication of effort that will occur if your recommendation is followed is also of concern to me. The results of my investigation and my report are inadmissible in court. Accordingly, the complainant must now carry the onus of making its case. The results of what my staff have accomplished through lengthy and costly investigation are now nullified. The cost to the taxpayer will be significantly increased, with no guarantee of any better result occurring than if the Ombudsman process were allowed to continue in its normal way.

I am also concerned by the fact that your recommendation flies clearly in the face of section 29 of the Ombudsman Act. I think I have given you copies of the act. This provision states that the Ombudsman Act is in addition to the provisions of any other act or rule of law under which any remedy or right of appeal or objection is provided for any person. The meaning of this section is clear to me. The Ombudsman Act has been declared by the Legislature as an alternative to legal action in the courts. It is therefore a right of an individual to choose an Ombudsman investigation and procedure instead of a court procedure.

This has been a constant principle applied in the Ombudsman's office since its inception. "Alternative dispute resolution" is the term currently used to describe methods of solving disputes other than through the courts. The Ombudsman is in the forefront of this movement away from litigation, as stated by section 29. Your recommendation conflicts with this statutorily declared goal.

Your recommendation, taken to its logical conclusion, is that the Ombudsman ought to have refused to investigate this complaint when it was first made because it was a legal issue.

As you know, the Ombudsman has a right under subsection 18(1) of the Ombudsman Act to refuse to investigate a complaint if, under law, the Ombudsman believes that an adequate remedy is available for the complainant. No Ontario Ombudsman has ever refused to investigate a complaint because the complainant has the right to sue the government. Section 29, read with the rest of the Ombudsman Act, makes it clear to me, as it has to all previous Ontario ombudsmen, that the existence of a legal course of action does not in itself allow the Ombudsman to refuse to investigate a complaint.

I have always been sceptical of an agency that refuses to act because it claims the action will create a bad precedent. This fear is rarely borne out. However, I believe that your recommendation that the Ombudsman's opinion be ignored rather than rejected and that the courts be the proper venue for determining the issue completely frustrates the Ombudsman process.

The implications are clear to me: Why would a government agency co-operate with the Ombudsman and disclose all its information to her if at the end of the investigation the agency could request that the matter go to court because it is in essence a legal issue best decided in a court of law? Your committee's recommendation is a precedent for this request, and I believe it will be followed by the government.

Quite frankly, I do not know how you could refuse a request by another agency to be treated the same as the Ministry of Agriculture and Food. Farm

Q's complaint is no different from tens of thousands of other complaints this office has investigated over the years. Farm Q's complaint may be complex but it is not unique. It is an example of complaints that we regularly investigate. The committee never sees the vast majority of these complaints because they either are not supported or they are resolved at an earlier stage. Your recommendation will clearly, in my view, have a destructive impact on future investigations.

Moreover, it sends a very mixed message to complainants. Are they to waste their time with the Ombudsman in the hopes of getting their litigation paid for ultimately at the public's expense through the Ombudsman's recommendation, or should they save time and avoid the Ombudsman and take their chances in court at their own expense if they can afford it?

Each year we receive hundreds of complaints involving breaches of contract, allegations of negligence and claims of governmental agencies exceeding their jurisdiction or acting arbitrarily. It is a common response from governmental organizations to my notices of intent to investigate these complaints that the complainant should go to court and should not be investigated by the Ombudsman.

This type of assertion, in view of your recommendation, will make it difficult to answer these agencies. How can I respond, as I have in the past, that the Ombudsman has the authority and ability to investigate these complaints, if the committee will not consider them?

The Ombudsman has the responsibility to investigate complaints that deal with any type of government action and to consider a full range of issues as set out in section 22 of the Ombudsman Act. These include the very issues that the courts must decide, such as whether actions appear to have been contrary to law or based wholly or partly on a mistake of law. Beyond this, the Ombudsman must also go where the courts are not permitted and consider whether government action is fair in its broadest sense.

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In considering my response to your recommendation, I am worried about how future ombudsmen will decide the merits of investigations if they must deal with the possibility of having to fund a complainant's legal court case in the future. As you know, I am currently involved in litigation with the government to determine my right to investigate the government's actions against the Crown Trust preference shareholders.

It is not prejudicing the case to say that the issues can clearly be characterized as legal in nature. The shareholders could initiate a lawsuit. The issue can also be considered, in terms of the Ombudsman's broad mandate, to oversee government maladministration. This investigation will be conducted within the context of not only the legal issues but also of whether the government acted unreasonably or improperly discriminatorily or wrongly towards these complainants.

Should I fetter my discretion and ignore the legal issues, to avoid the possible result that if the complaint were supported and brought before the committee, it might then be sent to court? I do not intend to breach my statutory duty by refusing to investigate the Crown Trust complaint because it could be decided in court, although to do so would save the taxpayers hundreds of thousands of dollars in my staff's time and potential committee time, should this matter be supported, as well as the potential cost of having to

pay the complainant's legal fees, should the committee make a similar recommendation in the Crown Trust case.

I also ask myself if I or future ombudsmen should be concerned with the overall impact on my budget by such a recommendation and thereby impose a very strict burden of proof on complaints before I support them. Your recommendation is completely open-ended and imposes no limits on the amount of fees that I may have to pay for Farm Q's legal fees and possibly its expert witnesses' fees, and fees of an appeal, if any.

I am not a party before the courts and it puts me in an untenable position requiring me to ask for funds to support a process over which I have no control. Moreover, your recommendation may create an expectation among other complainants that they should be given similar consideration by the Ombudsman and the committee for the payment of legal fees.

The legal problem presented by your recommendation leaves me equally dismayed and perplexed. The problem as I see it is this: Does the Ombudsman have the authority to pay for the legal costs of a complainant's lawsuit? The answer to this question depends on an interpretation of the Ombudsman Act as a whole and the general policy considerations which prompted the establishment of the Ombudsman for Ontario.

Clearly, I can apply for supplementary estimates and the Board of Internal Economy may grant me the funds. However, I must decide if I have the authority to spend the money for this purpose. A corollary question is whether the Legislature is authorized to appropriate money for the Ombudsman for this purpose.

The Ombudsman's powers are narrowly prescribed in section 9 of the Ombudsman Act. This section permits the Ombudsman to lease premises and acquire equipment and supplies as are necessary for the efficient operation of her office. The Ombudsman's funds are appropriated by the Legislature pursuant to section 10 of the Ombudsman Act as are required for the operation of her office. In my opinion, the operation of the Ombudsman's office does not include the payment of legal fees and, accordingly, I would be breaching the Ombudsman Act if I were to pay these fees. The Legislature would also be acting without proper authorization to appropriate funds for this purpose.

The Ombudsman's function, as stated above, is to investigate and report. She can do no more. Your recommendation goes beyond the Ombudsman's powers because it is not for the purposes of investigation or reporting. It is, quite frankly, for the committee's purposes, and it would be more appropriate for the committee to acquire the funds itself to pay for the litigation of the complainant, if you continue to believe that this is the appropriate course of action. Such a payment by the Ombudsman is destructive of the Ombudsman's role. In view of the foregoing, if the committee wishes, I am prepared to bring an application under the Ombudsman Act to ask the Divisional Court to determine where I have jurisdiction to implement your recommendation.

I wish to emphasize that I see this as a very different type of payment than paying for legal fees for counsel during the course of an investigation. I clearly have the authority to make such a payment if I believe it is appropriate and necessary for the proper conduct of an investigation. This is what occurred in the Pickering case.

I also see this differently than a recommendation made to a governmental organization for an ex gratia payment that can be implemented by a line item

in the governmental organization's estimates. My recommendations to governmental organizations for ex gratia payments are part of my investigation of their responsibilities and functions and come within the governmental organization's mandate.

The Ombudsman Act anticipates that the Ombudsman will be making such recommendations and the Ombudsman Act is clearly directed to government. As such, my recommendations are part of the overall governmental process in Ontario. This is different than what the committee is recommending that I do. The payment of legal fees is completely outside the Ombudsman's area of responsibility on both a policy and legal basis.

In retrospect, I believe your recommendation was largely prompted by the fact that Dr Hill's report did not contain a recommendation on the amount of damages to which Farm Q could be entitled. The committee was greatly concerned about undertaking a de novo investigation or review of this. This was not our intent. If the committee agrees, I am prepared to reopen my investigation to consider the question of damages and present a full report to the committee on my recommendation for damages, if any, as quickly as possible.

This proposal would put the issue of damages back in my hands, where it properly belonged in the first place. I do not intend to reopen the issue of the ministry's wrongdoing because that has already been determined by Dr Hill and representations have been made to the committee on this matter. I believe this would be a solution that will maintain the integrity and effectiveness of the Ombudsman. I thank the committee.

The Chairman: Thank you Mrs Meslin. Mr Bell?

Mr Bell: Mrs Meslin, can I just try to get some focus on the salient parts of your submission? As I understand it, and these are in no order of priority, they are just for listing purposes, concern number one is that the committee had determined the adversarial process to be judicial. Is that correct?

Mrs Meslin: Yes.

Mr Bell: Had the committee decided any other form of adversarial process, you would not have the concerns you have expressed in this statement. I am going to suggest to you that you would not because we had a discussion about other forms of adversarial process and nothing of this type was raised by you or your office. So it is judicial, correct?

Mrs Meslin: Yes.

Mr Bell: I am going to ask you to tell us in a few moments how you would see a difference between the judicial process and another form of an adversarial process as adversely affecting your office, given that any process identified was to make some determinations of fact and perhaps law. So keep that aside.

Do I understand a second concern is that the committee in the last of its three recommendations has given it to the Ombudsman to pay for the legal costs of the complainant in this judicial adversarial process if the Ombudsman considers it to be a necessary thing? Is that the second component of the concern?

Mrs Meslin: I do not think you have made that question clear to me.

Mr Bell: All right. The second component of the concern is that you are expected to pay the legal costs.

Mrs Meslin: Yes.

Mr Bell: I take it that if the committee had decided that the ministry or some third party was to pay those legal costs, you would not have the concern that you have as reflected in the statement.

Mrs Meslin: No, that is not altogether true.

Mr Bell: Well, what would be the concern?

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Mrs Meslin: What we are—

Mr Bell: Just let me finish the question. What would be your concern if, for example, the committee had decided that the ministry assume the legal costs?

Mrs Meslin: When we were faced with the entire issue put before us and had to examine what was happening here, you have put your finger on the two basic concerns that we have tried to outline. One is that the process be removed from the committee and put in the courts. Two is that having said that, the committee then said not only that, but the Ombudsman should be paying for that.

Mr Bell: All right. This may sound a bit repetitive but the first part of that concern in the courts is only a concern because it is in the courts and it would not be a concern if it was in any other adversarial forum?

Mrs Meslin: For damages, not for liability.

Mr Bell: For what it has been asked to determine. Okay? All right?

Mrs Meslin: Yes. Okay.

Mr Bell: Going to the second part, what is your concern if, for example, the ministry had been the one designated to pay the legal costs? Bear in mind legal costs are an ever-present issue in this regardless of adversarial process and regardless of issues. So can you help us understand what your concern would be, as I say, if the ministry were the one required to pay?

Mrs Meslin: The concern would be that we are trying to put before the committee the Ombudsman's concern about going to court for a determination of liability. Now we have had experience, as this committee knows, with going to an arbitrator to determine costs, not liability, costs. We have no concern with that.

Mr Bell: Then I take it for the committee the legal fees issue, the concern is the same as the first concern, that it is in the courts.

Mrs Meslin: Yes.

Mr Bell: And so the legal fees is really your concern, is driven by that?

I guess the question is, what is unique about the judicial process as distinct from other adversarial processes that raises this concern? Let me preface it by saying that your office historically, there are only two people in this room that go back this far and one is Murray Gaunt and one is myself, Murray and I go back to 1973, but I can tell you since 1976 there have been a number of examples where your office has participated in a process where third parties determine issues and in respect of which your office has participated in some way in the legals.

The first was North Pickering. There is one part of North Pickering, perhaps, that we have overlooked and that is that there was a public inquiry struck as a result of North Pickering and Ian Scott, now Attorney General, was counsel to certain of the former Ombudsman complainants. If my memory serves me correctly, there was no question that the public inquiry was to determine issues in respect of those complaints. I believe that it was your office that paid for Mr Scott's legal fees. If I am correct, I do not see any difference between that and what we are looking at here.

The question is, what is it about the judicial adversarial process that creates all of these perceived adverse effects that the other adversarial processes do not?

Ms Morrison: Just a comment about the difference between the judicial process and some other processes, at the beginning of many of our investigations, as the Ombudsman has stated, many ministries say to us, "This is a matter which could be determined in the court?" We do not feel we have discretion to refuse a complainant on those grounds.

If the ministry came to us and said, "Okay, we admit liability in this case. We are not sure how much the damages are, but we would like to go to a third party and if you would agree on this particular third party, we could use that mechanism for deciding what, in fact, we owe this particular complainant," we would have no concern about that at all.

The process we are talking about here is one in which we go through the whole process of a lengthy investigation to determine matters which are not admissible in court and at the end of that turn around and go back to the court to have the whole matter decided again.

I think because the court process is the very process that would be the one suggested at the outset by the ministry, that causes us great concern because it will give us no guidance as to what we should do with the next case that comes before us.

Mr Bell: Let me respond to your comment by the same question. What is it about the judicial process that makes it special at attracting these perceived adverse affects that the other forms of adversarial process do not? The chronology of this committee's treatment of this case is that your concern was expressed as a result of the committee determining it to be judicial and not any of the other forms. You participated readily in discussions about other forms of adversarial process.

Ms Morrison: I think we would have had no difficulty in agreeing to another form of adversarial process which did not decide the question of liability. The point is we cannot go through the whole process, have a finding of liability by the Ombudsman, have a finding of liability by the committee or a finding by the committee that someone else has to go now and find liability.

I think it is that process. We would have had no problem agreeing to an adversarial process which determined the damages in the issue. The problem is to send the whole issue back for the very question that the Ombudsman determined to be looked at by the court in a very strict, legal framework.

We believe it is a very negative thing for our process.

Mr Bell: Okay, last question. Remove judicial from your last comment and substitute an adversarial process. That is exactly what happened in North Pickering. Let's be frank about it. We have 16 years of water under the bridge. The reason what happened in North Pickering happened is because the Ombudsman did not do his job. It was impossible to make determinations—

Mrs Meslin: Mr Bell—

Mr Bell: Just let me finish please. —and an arrangement was struck among the ministry, the committee and the Ombudsman that identified a process to determine those issues. That is what created North Pickering.

All of those concerns that you have were issues that were present from the very beginning. Your predecessors do not seem to have had a problem with inappropriate circumstances, another forum undertaking the responsibility to make findings as they are required.

Mrs Meslin: You have to clarify something because North Pickering was certainly long before my time.

You started out your comments by saying the reason for the inquiry was because the Ombudsman did not do what he should have done. Are you saying that is the same thing in this process? Because our argument has to be—and we only look at case-by-case and then decide on the ramifications—that our difficulty from the outset, and I think it was made clear to the committee, was that we had hoped that the committee would continue the process to the end, i.e. hear damages.

We had made an agreement with the ministry that neither the ministry nor the Ombudsman would discuss any of the damages issue until liability had been decided. That was an agreement that we made with the ministry. We waited on the committee's decision. When that committee was forthcoming, both the ministry and ourselves were prepared to take the next step and bring before this committee the damages argument. The committee did not see fit to do that and now they have us in a position where we are on the horns of a dilemma because we are faced with what looks like a precedent-setting situation.

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Mr Bell: I do not think it is appropriate for me to comment on whether I personally think that the job was done. I mean the fact of the matter is, the first item that we indicated to the committee when this case was considered was that damages will not be determined by the committee. Everybody agreed with that. The committee would determine the other issues first. I am talking about the first instance now.

As the committee hearings progressed, it was—I know certainly the view of the ministry and we believe it was the view of the Ombudsman, and I know it was the view of a great many members of this committee—that to get into the damage issue, would require rather extensive hearings by this committee, including the taking of evidence. That is something this committee has

assiduously refrained from doing because other ombudsmen have suggested that if the committee does undertake such an endeavour that it is in effect substituting itself for the function of the Ombudsman. I better stop now. Perhaps, I can be of assistance later.

Mr Philip: I guess I am at a disadvantage because I was on another committee during the hearings of this. But coming in almost as an outside observer, I guess I find it somewhat bizarre that an argument should be made---and I was not on the committee when North Pickering was decided---but because the Ombudsman at that point, may allegedly not have done his job and it was sent to the courts, that we should somehow duplicate the mistake 16 years later then and say, "We are going to abrogate the responsibility of the Ombudsman in 1989 because there is a precedence that the Ombudsman did not do his job 16 years ago." That I find to be somewhat bizarre. Maybe I have missed something in Mr Bell's presentation.

As I understand the issue, the issue that the committee had trouble dealing with---and that in fact also dealt with the matter of responsibility---was the extent of responsibility and the dollar figure as to the damages resulting by whatever negligence the Ministry of Agriculture and Food may have been guilty of.

In the past, this committee has sometimes asked for independent adjudications in terms of pensions and things like this where a dollar figure could not be put on. But the committee's recommendation is not to have an adjudication of damages, but to have what amounts to a retrial. It seems to me that is very much different than what has been done in the past, namely that the committee has said, "We accept the verdict of the Ombudsman but we do not exactly agree as to how much the damages should be and we want an adjudication of this."

If this goes to court, it is not going to be an adjudication of damages it is going to be starting all over again, retrying and redoing the work of the Ombudsman. I think that that is quite different than what has been done in the past.

Therefore, I am inclined to accept that the Ombudsman now has said, "If the committee has had problems, because we did not assess the amount of damages, we are prepared to do that now and we are prepared to come back with a report to you and you can deal with it then."

It seems to me that without recycling any of the arguments I made in camera, that the Ombudsman has made similar arguments in her report that I tried to stress when we were trying to decide this case and I kind of dropped in on it when you were writing your report.

Therefore I would recommend, or I would move, that no further action be taken by this committee other than to accept the recommendation contained on page 6 of the Ombudsman's report to the committee today, and that we anxiously await back the report of the Ombudsman on this matter.

The Chairman: I have Mr Charlton, Ms LeBourdais, Mr Carrothers and it is after 12 o'clock.

Mr Charlton: Just very briefly. I think Mr Bell's final comments accurately reflected the mood of the committee, and the committee's feeling that we were going to have to hear the evidence and try and determine the extent of damages in this committee. The response which the Ombudsman has made

to us this morning is a far different response than that prospect. I certainly would support Mr Philip's motion.

Mrs LeBourdais: I am just wondering if you could elaborate a little bit on the section where you say, "I have always been sceptical of any agency that refuses to act because it claims the action will create a bad precedent. This fear is rarely borne out."

I was wondering if you could elaborate as to why you are making that comment and if precedents are set that we always feel are the rule in law that once a precedent has been set subsequent actions are taken and I believe it is general knowledge that there are other similar cases to Farm Q. I wonder if you could just give me a better sense of that.

Mrs Meslin: I am not quite sure I understand what you are asking me. What we are looking at, we know this will set a precedent.

Mrs LeBourdais: Okay, but you are saying that this fear is rarely borne out--the decision becoming a bad precedent. You are saying that precedents such as these are not followed? I am a little unclear as to your statement there.

Ms Morrison: Perhaps I could clarify, I think the paragraph was intended to say that essentially what we are saying here is we do not want to do this because it will set a bad precedent. We have not been very accepting of ministries saying to us, "We do not want to do this because it will set a bad precedent." What we are saying is we are not usually very convinced by that argument, that is, ministries say to us, "No, no, we do not want to implement your recommendation because it will set a bad precedent."

Mrs LeBourdais: Yes.

Ms Morrison: We are making that argument here and we are saying it will set a bad precedent.

Mr Carrothers: I will be very brief in view of the time.

Again, I still have some trouble understanding why this would create a precedent. I think it is a highly unusual case. I think it is far more like what happened at the Pickering situation. Certainly, as someone who listened to this, I cannot feel that any of the issues of damages or anything else could be dealt with without hearing from the parties involved. I think that then turns this committee process directly from not second hand because I think issues of personal credibility and everything else come into this, and it is just something beyond the nature of this committee and a process I would not like to see it get into.

I would comment on one other thing. At the beginning of your comments, you talk about somehow not being adversarial and I can appreciate that but it does seem to me that when you come before this committee that is indeed what has happened. We are adjudicating between your recommendation and the ministry and it is an adversarial process. I just wanted to comment.

I think it is an adversarial thing once it gets to us and something has to be determined in an adversarial forum, but it is not this forum. I strongly feel the recommendation of this committee, which we took after some long deliberations, and I think some great wrangling in our minds as to what should take place, should stand. It was not made lightly and I think perhaps, as the

Ombudsman's office expects the ministries to take our recommendations and find ways to implement them, because as a whole process I think we perhaps are trying to find ways around technicalities. This is exactly one not perhaps unlike what we are asking the Ministry of Education to do, find a way to do something it thinks it cannot do and I think I will support the decision that we made.

I do not think this committee can deal with damages and I think separating liability, the whole issue becomes issues of credibility and so on, and I think to take it and keep it before this committee would fundamentally change the nature of this committee and how it works. I think the decision that we took should stand.

Mr Cousens: I do not think the committee, at any point, ever intended to cause any major harm. As I look at some of the terms that are coming out of the remarks made by Mrs Meslin, I conclude in my own view after hearing your points and having considered the judiciary or whatever process it is going to be to help resolve the situation, it is far bigger than just assessing what the damages are.

It has to do with what is involved between the parties. I therefore do not accept, reluctantly, the recommendation that you have made. I think it is finished. As a committee, we have dealt with it. We have spent a lot of time thinking about it. We appreciate your input. Again, today, it helps us reconsider the role of the Ombudsman and how you work.

Should you decide to proceed with your statement in here that you are going to look at the courts and other processes to see whether it is valid or not, that is fine, but along with Mr Carrothers, I think we have done our job, we have looked at it and the special circumstances surrounding it; on with it. I am not supporting the motion put forward by Mr Philip.

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Mrs Meslin: Just a quick comment to Mr Carrothers, because I hope the committee does not at any point in time assume that the Ombudsman, after making the arguments I have made, would in any way intend to refuse to do as the committee is requesting. We have raised the problems and we have said that should the committee stand on it, we will have to ask the courts if we can do it, but we will not refuse to do it at all. I think that would be a contempt of the committee, and certainly as long as I am Ombudsman, that would not happen.

One other quick issue was Mr Carrothers' indication about this unique case and its complexities. I should once more underline that for those of the committee who sat in the Argosy deliberations, I do not think you will ever find anything as complex as that, and yet the committee saw that process all the way through to the end. I think that in damages issues they have the ability to do it.

The Chairman: I am looking at the time. There are a couple of members who have indicated to me that they have time constraints. I feel that we are coming to a vote and I feel it is very important that we have full representation when that vote does come.

The motion on the table is that, as it says on page 6 of the Ombudsman's presentation, she reopen the investigation, consider the question of damages and present a full report back to the committee. I have Mr Charlton who would

like to make a comment on that, Mr Bell has a clarification, and then I really must call the vote for today. Then we can discuss whether we need further discussion or whatever, but I really feel that without full representation for the vote, we are doing it a disservice.

Mr Lupusella: If I may, is there any way to rise for today and initiate discussion next week if there is any other position or what?

The Chairman: That certainly is something that—

Mr Carrothers: Move to the vote as you have suggested. I would support dealing with it after.

The Chairman: The problem I have with next week, and I say this honestly, is if we are not permitted to sit next Wednesday, either because we have adjourned or the alternative, which is that we sit all day Wednesday to get out of here, whatever may happen. We just do not know what is going to happen next Wednesday and Thursday. I feel that this is something that should not wait till we have our weeks at the end of September. That is why I would prefer, unless there is strong objection or whatever, to proceed to the vote.

Mr Lupusella: I would like to speak on the issue. I think—

The Chairman: You were not on my list.

Mr Lupusella: I understand, but it is a very important vote that we have to take, and those who have to consider the previous recommendation.

Mr Charlton: The chairman has made a ruling.

Mr MacDonald: Madam Chairman, can I hear the motion again?

The Chairman: Mr Philip, please correct me if I am wrong. The motion is to support the recommendation, if I may call it that, made by the Ombudsman on page 6 of her report that she would be prepared to reopen her investigation to consider the question of damages and present a full report to the committee on her recommendation for damages, if any, as quickly as possible. This proposal would put the issue of damages back in the Ombudsman's hands, where she believes it appropriately belonged in the first place. She would consider the damages and the damage issue would come before the committee with the report.

Mr Charlton: I have to take very serious issue with the points which Mr Carrothers put on the record. They may reflect his personal thinking at the time we discussed our recommendation, but they certainly did not reflect the discussion that occurred in this committee.

The proposal that was put to the committee was put on the basis that the Ombudsman had not dealt with the issue of damages and that it was the view of the committee and the view of a number of members of the committee who expressed their views that we were not in a position to determine the extent of damages. It was never the position of this committee that if we had a recommendation before us from the Ombudsman's office, we would not consider that recommendation in the same fashion as we consider all recommendations from the Ombudsman's office that get referred to this committee.

That is all the Ombudsman has requested of us here today.

The Chairman: Let me also just remind the committee that the recommendation that is on the table and that was in our report, that this proceed to an adversarial process which was a judicial one, and that the Ombudsman pay the costs of Farm Q. That is where we are at. Now we have this new motion.

Mr Bell: Mrs Meslin, just for clarification about the proposal on page 6, which is now embodied in a motion, should you be instructed to do that, is it your intent on the question of damages to address not only the quantum of damages but the causal connection between those damages and the so-called inaccurate information that Farm Q relied on and your investigation and report concluded it relied upon in respect of the selection and the purchase of the animals?

Mrs Meslin: My understanding when you speak about causal connection is, once again, the liability issue which I had assumed we had addressed.

Mr Bell: I guess the question is, are you satisfied that your current report addresses the issue of a causal connection between that data you found was relied upon and any damages suffered? Or would you go back and reflect on that and decide whether that applies?

Mrs Meslin: In fairness, if the committee decided on this process, we would look again at it because our job is to give the committee everything we believe it needs to make a decision.

Mr Philip: Before the vote, I am just going to take 30 seconds to address you on a motion which I feel very strongly about.

What we have is a situation here now which we have not had in the last four or five years anyway in this committee, which is that if the committee does not pass this motion or the motion which is giving the Ombudsman an opportunity to come back with more detailed information for the committee, the Ombudsman then will be forced to implement a recommendation which the Ombudsman feels very strongly against.

I suggest to you that is putting a wedge between this committee and the Office of the Ombudsman which has not taken place either under this Ombudsman or under Dr Hill. I suggest to those of you who have not gone back into some of the older controversies between the committee and the Ombudsman that is not a good thing to do.

All that I am asking for in this motion is for some time. If the Ombudsman comes back and the report is not satisfactory and the committee at that time still feels it wants to go with the original recommendation of sending it to the courts, it can still do it. It does not eliminate the original motion which you saw fit, for whatever reasons, to propose.

I suggest to you that there are some very strong process reasons concerning the operations of the Ombudsman and concerning the way in which the Ombudsman's office has historically operated and all ombudsmen's offices operate, to my knowledge, that will be affected by this and I ask you to seriously consider. Give the Ombudsman a chance. If the report of the Ombudsman is not acceptable, then you may consider the more dramatic action but I ask you to vote for my motion.

The Chairman: I have been advised by legal counsel—and this may be a moot point if the motion is defeated—if the motion is approved that the

ministry should be given an opportunity to respond. In the event that this motion passes, I would ask that we allow time for the ministry at some future date to come before us and respond.

Motion agreed to.

The Chairman: I do not see any need for a recorded vote unless anybody is pushing that. The motion passes which Mr Philip had on the table. We would allow the ministry, either in writing or in some way, to respond, in the method which seems appropriate. I would just ask how quickly you think that you would come back with this report, given that we may be given two weeks in September to sit.

Mrs Meslin: We would undertake, certainly, because of the urgency of it, to have the report by then.

The Chairman: Thank you very much. Anything further? I would suggest --

Mr Philip: I think the debate today and the discussion does show the nonpartisan nature of the Ombudsman's committee does work.

The Chairman: Thank you. The committee is adjourned.

The committee adjourned at 1220 pm.

STANDING COMMITTEE ON THE OMBUDSMAN

APPOINTMENT OF OMBUDSMAN
ANNUAL REPORT, OMBUDSMAN, 1988-89

TUESDAY 19 SEPTEMBER 1989

Morning Sitting

STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Bossy, Maurice L. (Chatham-Kent L)
Bryden, Marion (Beaches-Woodbine NDP)
Carrothers, Douglas A. (Oakville South L)
Cousens, W. Donald (Markham PC)
Henderson, D. James (Etobicoke-Humber L)
LeBourdais, Linda (Etobicoke West L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Substitution:
McLean, Allan K. (Simcoe East PC) for Mr Cousens

Clerk: Carrozza, Franco

Staff:
Evans, Catherine A., Research Officer, Legislative Research Service
Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon

Witnesses:

From the Office of the Ombudsman:
Meslin, Eleanor, Temporary Ombudsman
Morrison, Gail, Acting Executive Director
Zacks, Michael, General Counsel
Sora, David, Manager of Regional Services

LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON THE OMBUDSMAN

Tuesday 19 September 1989

The committee met at 1012 in committee room 2.

The Chairman: Welcome to our two weeks of the standing committee on the Ombudsman. We have some of our past members back with us. Mr McLean, it is nice to see you with us again. For those who do not recognize our research officer at the front because they may be new members to the committee, we have Catherine Evans, who served this committee for a few years and then took a leave of absence, had a little baby--

Ms Evans: A big baby.

The Chairman: --went to Australia, and is back with us for this week because Jennifer Wilson is serving on another committee this week.

We have today the special pleasure of having Mr Pollock back with us. I just wondered if you would like to say a few words.

Mr Pollock: I just want to thank the committee members for all their cards and good wishes and also for the basket of flowers. I certainly appreciated it. It helped put in the time. It is always good to hear from your friends on the Ombudsman committee or any committee. I am sorry I left you rather suddenly last spring, but those things happen. Anyway, it is good to be back with you.

The Chairman: We are pleased to have you back. We were all sad to hear of your illness but glad to see that you are back and looking well.

Today, we are dealing with the annual report of the Ombudsman, the 1988-89 report. Unless there are any comments or questions from the committee before we commence, I would give the Ombudsman an opportunity for a few opening remarks. Seeing no one interested in bringing up any controversial matters, Mrs Meslin, did you want to make a few remarks?

APPOINTMENT OF OMBUDSMAN

Mrs Meslin: Before I begin my formal presentation to you this morning, I wish to inform you of a matter of some importance to the operation of the office.

As you are aware, Dr Hill retired from his position as Ombudsman on 21 March 1989. At that time, I was asked to assume the position of temporary Ombudsman and an order in council was duly passed to provide me with the necessary authority to do so for a period of one month. When that order expired, another was put in place for the next two months. Then on 30 June I was asked to continue as temporary Ombudsman until 15 October when the House would be back in session.

A few weeks ago, I received information from the office of the Attorney General that upon reviewing the legislation, the Attorney General (Mr Scott) was of the view that a temporary Ombudsman could not be appointed for a term longer than six months. Therefore, my 15 October appointment would be revoked

and the termination date changed to 20 September 1989. After that date, I will return to my position as executive director, with acting Ombudsman administrative authority only.

Since no permanent appointment can be made unless the Legislature is in session, this will leave the office without a duly appointed Ombudsman in terms of statutory authority. In the circumstances, no final decisions can be made upon complainants' cases; therefore, no final reports can be signed and our work will be substantially delayed.

In fairness to complainants who inquire about delays, I will have to tell them that they must await the appointment of a permanent Ombudsman before their concerns can be decided, and, to be fair to the new Ombudsman, that some additional time may be required for him or her to become familiar with our legislative procedures and the results of the pending investigations before providing complainants with final reports.

I felt it would be irresponsible of me not to bring this to the committee's attention, as many members may begin to receive inquiries or complaints from their constituents about the delay in dealing with their concerns.

Before I begin my remarks on the annual report, I will answer any questions if there are any.

Mr McLean: Some of the government members may be able to find out if cabinet is going to appoint a new Ombudsman tomorrow. In that case, it would be looked after. I think it would be wise if they had an order in council to appoint Mrs Meslin. That would be the Legislature?

The Chairman: We have to wait until the Legislature resumes. I actually spoke with the Attorney General when Eleanor Meslin first brought this to my attention and they really are locked until 11 October. We will certainly pass along your remarks to the appropriate person.

Mr Philip: Since you have had the experience of being with Dr Hill from the very beginning, in your experience, assuming a new Ombudsman is appointed after the Legislature reconvenes on 10 October, which probably means at the very earliest a week or two later than that, if emergency legislation is introduced, how long would it take the new Ombudsman to get into the post? How long did it take Dr Hill to orient himself and to sit down and start making decisions?

Mrs Meslin: In Dr Hill's experience and in the experience of previous ombudsmen, there is a six- to eight-week minimal briefing time, especially if the person is not familiar with the legislation or the way in which the Ombudsman operates, in order to understand the various distinctions in his powers and then to become familiar with those cases that are presently in investigatory stages or in stages where they are ready for meetings with the Ombudsman. I would say a minimum of six to eight weeks.

Mr Philip: So you are telling us that the lack of action on this probably means that no real decisions are going to start coming out until after Christmas. Is that a fair assumption?

Mrs Meslin: I would think so.

Mr Philip: Can you tell us how many people would be affected by this?

Mrs Meslin: Are you talking about complainants?

Mr Philip: Complainants.

Mrs Meslin: Not off the top of my head, but generally, we have ongoing a couple of hundred investigations at any one time. So at any stage in that investigatory process, they may be ready for an Ombudsman. Certainly at the beginning of all those processes, an Ombudsman has to become familiar with the case. The process I have developed is that every letter that comes in addressed to the Ombudsman, before anything happens with it, comes by my desk for me to read so that I can see what the complaint is. Then it proceeds on through the process.

Mr Philip: I wonder, Ms Morrison, in your capacity, if you would be able to give us any idea how many people are likely to be affected by some kind of backlog that will be created by this problem.

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Ms Morrison: It is difficult to put a figure on it, although, for your information, for example, in terms of supporting cases, we have a case conference once a week in which we deal with three or four support cases at least. In terms of the regular jurisdictional cases, there were almost 3,600 jurisdictional complaints over the year and those moved through the process in a fairly regular way, so you are talking about 300 jurisdictional complaints a month which are going through the process at one stage or another.

Mr Philip: When you say closed, though, they could be closed without the Ombudsman, could they not?

Ms Morrison: They can be closed only if the complainant is satisfied with some other information we give them, but the Ombudsman is the only person in the office who can make decisions whether to support or not support a case.

Mr Philip: So you are talking about 300 per month?

Ms Morrison: There were 300 jurisdictional cases per month on average closed over the last fiscal year.

Mr Philip: From 20 September to, one would assume, probably 20 January, you are talking about--October, November, December, January--four months' delay, so you are talking about the possibility of up to 1,200 individuals delayed.

Ms Morrison: That would be the expected number of closed jurisdictional complaints during that time. As I say, some of those will be complaints in which someone has come to us and we have provided them with information which has satisfied them and the Ombudsman does not have to make a decision whether to support the case or not.

The Ombudsman process, the way it is outlined in the legislation, really only allows the Ombudsman to make a decision whether or not to support a case. So both the cases which we support, some of which end up here, and the cases which the Ombudsman does not support--in fact, supports the government's position--all are matters which have to be dealt with by the Ombudsman.

Mr Philip: From the point of view of a person who is dealing directly with staff, I guess, what does this kind of delay do in terms of the

morale of the staff? Are you having any increase in turnover because of the uncertainty? Is there a morale problem created by these delays?

Ms Morrison: I do not think we would expect to see an increase in turnover yet, but I think what we will see is that our work will have to be delayed and although people can work as hard as they can to get a case to a particular point where it can await the decision of a new Ombudsman, it will be difficult for people to see the work product, because everything they do will have to go into abeyance until a new Ombudsman can make a decision.

I think it generally tends to be demoralizing for people to think their work is not going to come to fruition in a short time and that indeed there is not anyone there to make a final decision on the information they have gathered on an investigation.

Mr Philip: Mrs Meslin, what contacts have you had with the Attorney General since you took over the position of temporary Ombudsman, concerning the problem that the Office of the Ombudsman is now facing? Have you expressed to him in writing on several occasions the fact that some decision must be made? On how many occasions would that have been done?

Mrs Meslin: I have contacted him towards the end of each appointment to find out what would happen, and did again contact him when he informed me that they would have to revoke what I thought was an appointment until October. I have had a lot of communication by telephone with his staff. Yesterday I received from him a letter outlining his position in relation to the fact that there could not be a permanent Ombudsman, of course, and that he felt I would continue in the acting position with those administrative powers an acting Ombudsman has, but that the powers of the Ombudsman to make reports and sign them would have to wait in abeyance. His letter said he was hopeful that that would not be too long.

Mr Philip: So you have contacted him on three occasions by letter?

Mrs Meslin: No. I have contacted him on half a dozen occasions by telephone and on one occasion by letter that triggered it all. I received his responses by telephone and then yesterday his written response.

Mr Philip: In each of the cases that you telephoned him, he has spoken to you at least?

Mrs Meslin: I have not spoken personally with the Attorney General. His staff has called me.

Mr Philip: So you have not had a personal contact at all with the Attorney General, despite six phone calls to him?

Mrs Meslin: No. That is not fair to the Attorney General, because I did not ask to speak to him particularly. I raised the issues.

Mr Philip: You shared with us the contents of the letter from the Attorney General. Are you at liberty to table the letter, or do you consider that a confidential, personal letter?

Mrs Meslin: I do not have any problem sharing it.

Mr Philip: I think it would be useful for us to have it in writing, because it would at least tell us the section of the act.

One last question, and then I hope I will be put back on the list. Is the interpretation by Michael Zacks, as your counsel, the same interpretation as that of the Attorney General? I wonder if Michael could give us that. I assume that you looked at--

Mrs Meslin: Yes. I should indicate that I asked Michael for his opinion on this issue and Michael did provide me with a legal opinion.

Mr Zacks: I have not actually seen the letter yet from the Attorney General; so just give me a moment.

Mr Philip: What did you provide a legal opinion on?

Mr Zacks: I provided a legal opinion on the question of whether the Ombudsman Act would permit the appointment of an additional term as temporary Ombudsman. It was my view that one could interpret the legislation in that way, based on the legislation itself and based on historical precedent.

Mr Philip: So there is a disagreement between your interpretation of the act and the Attorney General's officials' interpretation of the act?

Mr Zacks: Yes, apparently so.

Mr Philip: In the case of McArdle, Mr McArdle was reappointed for how long by McMurtry?

Mr Zacks: In that situation, when Mr Morand's retirement occurred, he was appointed, after his retirement, as temporary Ombudsman for a period of months. When that term ended, Mr McArdle was appointed as temporary Ombudsman.

Mrs Meslin: And Dr Hill.

Mr Zacks: And Dr Hill after Mr McArdle; he was appointed temporary Ombudsman. The totality of those appointments far exceeded the six months but, as I say, that was a different situation. I believe that when Mr Maloney retired, Judge Hoilett was appointed. His appointment also exceeded six months. I may be wrong on that, but that is my recollection.

Mr Philip: In the case at least of Mr McArdle, which is the case that I am more familiar with because I was on the committee at the time, it would appear that Mr McMurtry's interpretation, if he did make an interpretation, would have been different from the present Attorney General's interpretation.

Mr Zacks: Yes, certainly. There were three temporary ombudsmen appointed, one after the other, for a totality of, I believe, 10 months.

Mr Philip: Ten months each?

Mrs Meslin: No, 10 months in total.

Mr Zacks: In total. Mr McArdle's appointment was longer than six months.

Mr Philip: McArdle's was longer than six months?

Mr Zacks: Yes. I believe it was seven months.

Mr Philip: Who else was longer than six months? Anyone else?

Mr Zacks: I believe Mr Hoilett's was longer than six months.

Mr Philip: Mr Who?

Mr Zacks: Keith Hoilett. He was director of legal services. I am going by memory. I may be wrong on that, but my recollection is it was longer than six months.

Mr Philip: From your recollection then, there would have been two temporary appointments under Mr McMurtry as Attorney General where Mr McMurtry would have either not taken the same interpretation as the present Attorney General —

Mr Zacks: That is correct.

Mr Philip: —or someone may not have drawn it to his attention that this kind of interpretation would be possible.

Mr Zacks: That is right.

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Mr Philip: Your interpretation is different from the present Attorney General's.

Mr Zacks: Yes.

Mr Philip: Thank you.

Mr Bell: Do you have the act before you?

Mr Zacks: No, I do not. I am sure there is a copy of it. Here we are.

The Chairman: Breast pocket.

Mr Bell: Have you considered, Mrs Meslin, how far you can delegate pursuant to subsection 27(1)?

Mrs Meslin: As a temporary Ombudsman now?

Mr Bell: Yes.

Mrs Meslin: My assumption from Michael's advice is that if I were to delegate now, I could delegate until a permanent Ombudsman was appointed. But I do not understand what the delegation would be because I am going to move into that delegatable position on Thursday. Why would I delegate somebody else?

Mr Bell: I do not mean anybody else.

Mrs Meslin: Delegate myself?

Mr Bell: Assume for the moment you can delegate to the position.

Mrs Meslin: You cannot. It is to a person.

Mr Bell: All right. Assume for the moment you can delegate and you can identify somebody. If you have a backlog currently or if there is one that is at risk because the interregnum period is unknown, why could you not delegate the power of decision under--

Mrs Meslin: You cannot. That is the only power you cannot make.

Mr Bell: Oh, no. You cannot delegate the power to report and you cannot delegate your delegation power, but where does it say you cannot delegate your decision-making power to formulate conclusions and make recommendations?

Mr Zacks: The power to make a report includes by necessity the power to make the decisions that go into the report. A report is not simply a piece of paper; it is all the conclusions, the recommendations and any other aspects that go into making up a report, which would include either an annual report, a report on a specific case or a special report to the Legislature.

Mr Bell: You do not separate the opinion-recommendation functions from the reporting functions.

Mr Zacks: No, I do not.

Mrs Meslin: Nor do I.

Mr Zacks: Otherwise, it is simply a rubber-stamping of the essence of the Ombudsman's function.

Mr Bell: If you do not believe you can separate those functions, there is no sense pursuing it. I would have thought, and I think some of your predecessors in office who held permanent positions thought, that you had the discretion to formulate the opinions and make the recommendations and then, as a separate matter, to decide whether to report it. But in any event, it is academic, I guess.

Mr McLean: Mr Bell, could the government not appoint another temporary Ombudsman tomorrow for six months?

Mr Bell: There is nothing in the act, section 7, that speaks to a limitation of one temporary Ombudsman. I guess it is an open question whether the first temporary Ombudsman so appointed could be appointed for another term not to exceed six months. You know, the courts have said that the spirit of this legislation should be interpreted as broadly as possible so as not to unduly restrict the operation and functioning of the office. I think a court, if ever asked, would readily interpret that section as permitting the first temporary Ombudsman to be reappointed for another period.

I think what there has to be, though, is a deliberate reappointment after the initial six months. That is my personal view. But I do not see a limitation on the number of appointments and probably an argument can be framed that the original is not so limited, to one term. I know your information is correct with regard to Mr McArdle. I cannot remember that far back as to whether it is for Judge Hoilett, but if it is, presumably things were done to make the last part of those tenures legal.

Mrs Meslin: The Attorney General does feel very strongly about the limitation on one term of a maximum of six months.

Mr Bell: I am sure he does. I guess the real question is whether that is pursuant to an interpretation of the section or whether that is just pursuant to what he wishes to have happen.

Mrs Meslin: The other question that I might pose, just in talking about it, is that if as the Attorney General says it can be one term, then could it be said that the first appointment that was made, of me, the first one-month appointment, was one term? Of course, it did not go six months, but in effect following his reasoning, there could not have been another appointment made for another term, of whatever.

Mr Bell: I do not know. I guess you can go all over. Another school of thought may well be that in the absence of a temporary Ombudsman, the absence of a captain at the helm, to give an analogy, maybe what is necessary is to have the decisions that have to made for the identification and appointment of a permanent Ombudsman. Where there is a will there is a way, I guess. You are stuck with September 20, it seems, so do everything you can in the next two days.

Mrs Meslin: I have been meeting and signing for months.

Mr Bell: It is a concern to the office and I know it is a concern to some of you that there apparently is this period of vacuum, if you will, at the top, but provided Mrs Meslin has made all the decisions etc that are available for her to make in the next two days, she is still able to function with you, as far as I am concerned, in an equivalent capacity as executive director, because everything that she needed to do has been done. It is therefore in your bailiwick. It is not going to interfere, I do not believe, with your ability to deal with the issues before you in the next two weeks.

Mr Philip: I think it might be well for the committee to comment on the need for some clarification on section 7. I think that is a broader issue. If it was the intention of the Legislature at the time not to have an Ombudsman appointed for more than six months exclusively by the Attorney General instead of by the Legislature, then that is one interpretation. That seems to be an interpretation this Attorney General may be taking.

On the other hand, as I listen to Mr Zacks and Mr Bell, I assume the reasoning behind Mr McMurtry's decision is that he or she could hold the office for a term of not more than six months without another temporary appointment. So it would be possible under that interpretation for the Attorney General to appoint for another three, four or five months, not exceeding six months, but he would have to make an official appointment, and could appoint the same person. Is that your understanding?

Mr Zacks: Yes.

Mrs Meslin: Except that it is not the Attorney General who appoints you.

Mr Philip: No, but obviously then we have a disagreement. There are two attorneys general, historically, who have dealt with this. One has obviously chosen one interpretation, which is Mr Bell's interpretation and yours. The present Attorney General has chosen another interpretation. It seems to me that if it is not clear in the legislation, then certainly that clarification should be made when the legislation is next dealt with.

Mr Bossy: Just a point of clarification here: Looking at that bottom paragraph, it says, "The authority delegated to you by Daniel Hill by memorandum dated April 30, 1984." So back to 1984, that delegated power has remained with you since the delegation by an Ombudsman. It does not happen to be there now, but did your delegated authority stop upon the retirement of the Ombudsman?

Mrs Meslin: No.

Mr Bossy: If not, it is indicated here that you have that full power to continue, as I read this.

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Mrs Meslin: Only the delegated power, which does not include the authority to make reports. If you read the delegation section of the act, it gives authority to an acting Ombudsman to do certain things, but not the same authority as to a temporary Ombudsman.

Mr Bossy: It is strange. If the authority was given to you and remains with you, it seems strange that it would then not just follow that you have that authority to act.

Mrs Meslin: But the delegated authority given to me by Dr Hill is limited by the act.

The Chairman: I see no further hands on this. Maybe to end this on a high note, if there is a way, I appreciate the difficult situation this has put us in, or you in, and just looking over Ian Scott's letter, our view is shared that you have done an excellent job as temporary Ombudsman. I think he notes both his satisfaction with the job you have done and his appreciation for the dedication you have put into the job of being temporary Ombudsman. I do not think the fact that there has been this legal difference of interpretation of section 7 should cloud the good work you have done over this period of time.

We look forward to a permanent Ombudsman being appointed when the Legislature resumes so that this uncertainty is settled. I note, both in my conversations with the Attorney General and in his letter, that he feels that other than the report process, which you say is a difficult one during this period of time, he considers you full authority and top person in the Office of the Ombudsman and that you can represent the office as fully as if you were the Ombudsman over the next two weeks. I do not think we should consider our function as the standing committee on the Ombudsman jeopardized in any way.

Did you have one further point, Mr Philip?

Mr Philip: Just on this point: Without in any way casting stones on the previous temporary Ombudsman, I think that those of us who have had some experience with this committee know that the experience has not always been satisfactory with temporary ombudsmen. Certainly, there have been no complaints against how you have performed and there has been no attempt by anyone that I know of on this committee, and certainly not by any members of my political party or from the Conservatives' point of view, I understand, to in any way suggest that somehow we need to appoint someone other than you as the full Ombudsman. I think that view has been expressed to the Attorney General.

I had also hoped that the Attorney General would consult with the committee in the same way that the Provincial Auditor's appointment is consulted on with the chairman and members of the standing committee on public accounts. I think that is the appropriate way to go. I would hope that the chairman here would express our deep concern and our hope that the Attorney General will consult with her and members of the committee and resolve this as soon as possible.

The Chairman: I think the best suggestion would be that we send the transcript of the last 35 minutes to the attention of the Attorney General. That would be the most effective way of doing that. I am sure the clerk will do that.

Seeing no further questions on this issue, perhaps now Mrs Meslin would like to progress with the annual report we have before us.

ANNUAL REPORT, OMBUDSMAN, 1988-89

Mrs Meslin: The first item of business on the committee's agenda is its traditional review of the Ombudsman's annual report. I should point out that this report is really Dr Hill's since it was the result of his final year as Ombudsman. However, as executive director at that time and now as temporary Ombudsman, I have taken on the responsibility of presenting this report to the committee.

First, let me correct a typographical error that is important to your understanding of our statistical data. At page 4 of our annual report, I noted that the number of complaints and inquiries closed in the past fiscal year reached an all-time high of 21,485. While it is correct that the number reached was an all-time high, the number itself should have read 24,998, representing an increase of 18 per cent over the previous year.

At this time, I am not going to provide you with detailed statistics. However, Allan Mills, our controller, and Gail Morrison, acting executive director, will highlight some of the important statistical data and answer your questions about this aspect of the annual report later today.

Many of the figures in the annual report are impressive, but they do not tell the whole story. To give the committee a better understanding of the work behind these statistics, I would like to illustrate for the committee some of the work we do that results in informal resolutions of complainants' concerns.

Because the committee reviews only cases in which the ministry or a governmental organization has refused to implement the Ombudsman's recommendations, committee members never see the results of much of the Ombudsman's work which involves co-operation with the various agencies of government. Often, an apology or explanation from the government official involved or from the Ombudsman, when a case is not being supported, is all that is needed to satisfy a complainant. In other cases, compensation may be appropriate or a reconsideration of the complainant's circumstances be required.

For example, in one case, the public trustee was not prepared to accept affidavit evidence that the complainant had submitted to substantiate his claim of entitlement to estate moneys. Our investigation did not reveal any maladministration on the part of the public trustee, but it did turn up some

additional genealogical evidence that satisfied his requirements. As a result, the complainant received almost $9,000.

In another case, we found that a ministry's tactics in collecting a debt from a complainant were unacceptable. The ministry not only apologized to the debtor, but also instituted training programs for its employees to ensure that members of the public would get the kind of polite and professional service they deserve.

Often we can assist people by simply providing appropriate information. An inmate with hepatitis B, for example, was refused a visit from legal aid staff because they were under the mistaken impression that his disease could be contracted through airborne contagion. Correct information from our staff member resulted in a prompt visit to the inmate and assistance with his legal problems.

Each of these separate events may seem small, but their importance to individual complainants may be inestimable and they illustrate the variety and relevance of the work of the Ombudsman.

If you will now turn to appendix A at the back of the annual report, you will see that it lists those recommendation-denied cases where your committee has made recommendations and the current status of those committee recommendations.

I am pleased to report that with the exception of Mrs H, which is the Ministry of Education pension case, all the committee recommendations have been implemented. Of particular note is the fact that in the Ministry of Government Services case, on page 41, the committee's recommendation to Management Board of Cabinet to place the sum of $2,239.91, plus interest, in the estimates for the 1988-89 year to cover the ex gratia payment was implemented, resulting in a payment to the complainant of $8,923.57.

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I also would like to draw your attention to the Ministry of Housing case on page 43. This recommendation was originally made in your eighth report and finally implemented in August 1989 resulting in a payment of $18,196.57.

As I have noted in the annual report, there are presently two court challenges to the Ombudsman's jurisdiction. The first is from the Board of Radiological Technicians which has taken the position that the Ombudsman has no authority to investigate its decisions. On the basis of previous court decisions, we believe we have that jurisdiction. The case will be heard by the Divisional Court within the next few months.

More significant, I believe, is the Attorney General's challenge that the Ombudsman has no jurisdiction to investigate the actions of civil servants carrying out their duties under the authority of an order in council. As I noted in the annual report, such a holding would limit the Ombudsman's ability to investigate in many important areas, which I believe would then result in a reduction of as much as 50 per cent of our work. This is a matter of utmost importance to the work of our office and the work of the committee, and I am hopeful that this too will be heard within the next few months.

Another matter which is traditionally part of the committee's considerations during our discussions of the annual report is the proposed amendments to the Ombudsman Act. Less than a year ago, this committee

considered requesting that the Attorney General (Mr Scott) appear before it to explain the delay in processing our amendments, but instead, the committee instructed the committee chair to discuss the amendments issue personally with the Attorney General.

Although, as a result of her meeting, assurances were given to the committee that the amendments would be put forward during the last legislative session, nothing has been done. Perhaps the committee should consider again whether it is satisfied with the failure of the Ministry of the Attorney General to give serious attention to its request to have these long overdue amendments introduced.

I would like to raise another issue relating to our legislation with the committee at this time. It arises out of regulation 4(ii) of our act, passed by the select committee on the Ombudsman many years ago. It can be found at page 13 of the Ombudsman Act. My understanding is that this section was enacted to handle a very specific problem, and perhaps at the time that purpose justified its passage. In my view, it is time for the committee to review this regulation.

We are required, under the rules of natural justice, to provide complainants with the facts adverse to their claim and to allow them to make representations to refute those facts, prior to the Ombudsman making an adverse decision on their complaint. It is almost impossible for an investigator to do this in a meaningful way if he or she is prevented from truthfully stating the case that he or she intends to put before the Ombudsman as a result of the investigation.

Such dissembling is demoralizing and difficult and does nothing to enhance our reputation as professional and impartial servants of the public. I would ask the committee to give consideration to modifying the regulation so that staff members may provide complainants with a meaningful assessment of the results of the investigation and honestly describe the recommendations they intend to make to the Ombudsman.

In August 1988, when Dr Hill reported to the committee on the 1987-88 annual report, he advised you that as a result of an outside consultant's report on case expediting, some 75 recommendations were made. I am pleased to report to the committee that we have now implemented the majority of them. Some, of course, were review recommendations, and these are ongoing.

Of particular note is the success we have had in adopting a new format for recording incoming telephone complaints. We have developed a quick intake form for those calls, where we refer people to municipal or federal agencies or merely supply the address or phone number of a ministry or agency. The intake officer simply ticks off appropriate boxes and informs the caller that we will not be opening a file on his or her call, as had previously been the case.

Another time-saving recommendation we have refined and implemented is in our administrative fairness process. Previously, once an investigation was completed but before the Ombudsman's report was issued, a detailed letter was sent to the complainant outlining all the evidence to date, which asked the complainant one final time if he or she had any additional information. We would then wait three weeks for a response, and if one was not forthcoming, follow up with a phone call. The general response to this process from

complainants was often, "Why didn't you just call me instead of taking all this time to send me information you had been giving me all along?"

Our new process does just that. Where the case is not a complex one, the investigator does the administrative fairness letter over the phone and the three-week delay is eliminated.

Overall, I am convinced that with the implementation of the case-expediting recommendations, we have greatly improved our case-handling speed.

One final matter that I would like to draw to your attention relates to the Workers' Compensation Appeals Tribunal and its response to a recommendation from our office. This is the first WCAT investigation that has resulted in a recommendation to the tribunal.

Page 26 of the annual report, detailed summary number 1 sets out the facts upon which a recommendation was made to the tribunal to reconsider a complainant's entitlement. As you will see from that summary, the tribunal has established an elaborate procedure to deal with our recommendations. However, it is a procedure which in the end results in the tribunal treating an Ombudsman's recommendation in exactly the same way that it would treat a request from the complainant prior to our investigation. This treatment of the results of an Ombudsman investigation does not seem to me to be appropriate or adequate.

While I am satisfied that the complainant in the case summarized has now received an adequate reconsideration of his concerns, I have brought this matter to your attention to discuss my more general concern with the tribunal's process. Your chair has agreed to invite Ron Ellis, chairman of the Workers' Compensation Appeals Tribunal, to attend on Thursday 21 September in the morning to present the tribunal's view of the matter. At that time, my staff will outline our concerns in more detail.

Members of the standing committee, I would like to take this opportunity to thank each of you for the support you have given me as temporary Ombudsman. I would also like to publicly thank the staff of the office who have been so very supportive and helpful in what must be for them a very trying and uncertain time. They are people who are devoted to the concept of ombudsmanship, and the citizens of Ontario are well served by them.

The Chairman: Thank you very much, Mrs Meslin. Is there anyone with questions?

Mr McLean: I notice on your information that you have gone from 4,572 in 1987-88 down to 3,588 in 1988-89. Is that because of the process you have implemented to speed up the appeals?

Mrs Meslin: Can I ask you to defer the statistical information? Gail has all those data and some introductory remarks after we are finished with this segment and we can get right into all that then.

Mr McLean: Okay.

The Chairman: I have a question in regard to the administrative fairness letter that you used to send out over three weeks. Do you also send a

copy to the complainant afterwards? I just wonder. I hate to see everything done over the phone, although it is more--

Mrs Meslin: Oh, you mean after the telephone call?

The Chairman: Yes.

Mrs Meslin: If the complainants feel that they want one, we send it out. Very often, the details on those cases that I have indicated were not complex are details that the complainant has been told all the way along. What the complainant wants is, "Let's get on with it," but because of the legislation we have to say: "Okay, one more time. Now you know all these things, is there anything else?"

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The Chairman: I just would be concerned, while I recognize that this is a saving of three weeks, if you did have something already in writing--or if this was just done verbally from the file but you did have something in writing--whether it might be administratively sound to say after the phone call, "Further to our conversation, just confirm this is what we discussed and you acknowledge that it was right."

I wonder, if you already have it prepared, if that might be advantageous to you just to have a record that that phone call did exist. I am always concerned in today's world that if these people have been through a great deal, confirmation by telephone and further in writing, can sometimes protect you, to ensure that it was done correctly.

Ms Morrison: Can I just clarify the process? In these cases, there certainly would be a memo on the file detailing the telephone conversation. The complainant always gets a written report at the conclusion of the investigation in any case in which the results of that telephone conversation will again be detailed.

There is never a closed, nonsupported complaint, for example, in which a nonsupport report does not mention the fact that the telephone conversation has taken place, what the results of the telephone conversation were and provide that information as part of what the Ombudsman's decision is based on.

The Chairman: Great. That is helpful. Since there were discussions about the Ministry of Health here, the OHIP and the case that we discussed regarding the donation of sperm or the paying for sperm, I just wanted to ensure that your meetings with top-level ministry officials are still under way. That came as a result, I think, of that particular case before the committee and I know we have discussed it. I just wonder if you found that it has been ongoing, how often do you meet or is it ad hoc, and have you found this beneficial to the process?

Mrs Meslin: Yes. As a matter of fact, certainly thanks to the committee, the issue triggered a whole new process between the Ombudsman and the Ministry of Health. We now meet on a regular basis with senior officials, and I must say that the deputy himself has seen fit to sit on this committee. He has attended every meeting. We have ongoing reports on all of the issues that trouble us, including the particular sperm issue. We had our last meeting as recently as last week with the deputy and his staff. He has agreed to

report on the sperm issue when he attends next week. He felt that he would like to report directly to the committee.

The Chairman: Great. I am really pleased to see that is still going on. The other question that I had was with regard to this regulation 4(ii). I do not understand it. It was the standing committee at the time?

Mrs Meslin: Yes.

The Chairman: The committee is empowered to alter regulations, as I understand it?

Mrs Meslin: Yes.

The Chairman: With 4(ii), I do not actually see the distinction. Maybe we can go through that. If the complainants are advised of the facts that are adverse to their claim—I gather that you can do that; you are allowed to tell them the facts that have come to light that are adverse to their claim. Is that correct?

Mrs Meslin: Yes.

The Chairman: They must know all the positive parts of their claim already because they have come to you with those concerns. I do not see where the gap is. They know all the positive and you have notified them of the adverse side. I do not understand how the regulation—and I have not looked at it—distinguishes. What are you looking for?

Ms Morrison: Perhaps I could clarify somewhat. The regulation prevents any member of the Ombudsman's staff from expressing to the complainant, for example, any opinion as to the outcome of the case. In the regular course of the investigation, the complainants will deal on a regular basis with the investigator and at the time when the investigator provides them with the facts which are adverse to their situation, they will say, "Now, when is the Ombudsman going to make a decision on this and what are you recommending with respect to the Ombudsman's decision?"

The investigator at that point has to say: "I don't have an opinion as to the merits of your case. I provide the Ombudsman with the facts and the Ombudsman will make a decision." According to our reading of this particular regulation, the investigator is not at liberty to say to the complainant, "And I am going to recommend to the Ombudsman that he or she support your complaint or not support your complaint," as the case may be.

This puts the investigator in a very awkward situation in providing the complainants with complete information as to what is going to happen next, because the complainants, of course, first of all, when you provide them with information adverse to their complaint, immediately think that you have not taken into account any of the information that is not adverse to their complaint; so they say, "You're going to base your decision on all the information that's against me and none of the information that is for me."

Second, the information that is provided to the Ombudsman, of course, is not just the facts of the case. Information provided to the Ombudsman is legal opinions which relate to the case and a general analysis of the facts and how the facts fit together to come to some kind of decision whether or not the ministry has been reasonable or unreasonable. Complainants often feel that they ought to be given more complete information at the administrative

fairness level as to the way the investigator sees the case. The investigator, after all, is the person who knows the case best.

This regulation really puts the investigator in a position of saying: "I don't have any opinion. I'm not prepared to tell you what my opinion is." Indeed, it sets up a kind of sense to the complainant, we think, that there is something which is being kept from them or that we are not being completely open with them.

In many other organizations in which investigators or people of that kind of function obtain facts to be acted upon by a decision-maker, they can make a recommendation to the decision-maker and are at liberty to say to the person whose case they are investigating, "I'm going to make this recommendation to the Ombudsman" or, "I'm going to make this recommendation to the decision-maker."

We feel that it would be a good thing in our process if investigators had the opportunity to say to the complainant, "I have done all of this work and my recommendation is going to be X." This is not to take the decision-making power away from the Ombudsman but to be more clear in our dealings with complainants about what information the Ombudsman is going to have before him or her to make the decision.

The Chairman: While I recognize the fullness of your argument, and it is a very compelling one, I also am a bit concerned about the position it puts the investigator in. I used to be in an intermediary decision-making process to a board of directors before this job, and I know I always had comfort in being able to know that they may change their mind on my recommendation and I could not say to the individuals in fact what my recommendation would be or what theirs would be.

I always felt a certain safety comfort in that I was confined to this confidentiality that I did not disclose, although I showed my enthusiasm and my eagerness to understand the case as well as I could, in your instance; trying to obtain whatever information I could out of the people for the project—it happened to be a project—and just showed through my dedication, my eagerness and my interest, my sincere desire to assist in any way I could. But I always could fall back on the position that the ultimate decision was that of the board. You may call that wimpish, but it was always a good one.

I know that you make a recommendation—the investigator does to the Ombudsman—but can you not see a little bit perhaps the positive side of it that they are not put under the pressure of disclosing to this complainant what their final recommendation is so that the blame does not go perhaps on the complainant but rather on the Ombudsman? I can see a value in that as well in my own mind. While it may be more compelling the other way, and Gail certainly has made a fulsome argument, I do see some support for the alternative view, which is that you really do not have to disclose and you can just show through your dedication that you are giving it a full consideration.

1110

Mrs Meslin: I think one of the difficulties that investigators have raised with us is that there seems to be a sense of dishonesty with a complainant when what you say in essence is, "All I do is get all of the evidence together and then the Ombudsman decides." The person realizes full well that the evidence itself does not come before the Ombudsman in a vacuum. You get the sense from people that the investigator is not being honest with

them. Even if the investigator were to be able to say to them, "If this information is all you have at this time, the recommendation I may have to make to the Ombudsman is that it is not very sufficient, but the Ombudsman will make the decision and may disagree."

The point is that the people have the sense that the person who has done it all has some view on it and is just putting it off and saying: "I have no view. I'm not allowed to have a view. I just have to give the evidence to the Ombudsman." There is something dishonest about that.

The Chairman: Do you have a supplemental?

Mrs LeBourdais: No, my question is not on this.

The Chairman: How about if Mr Bell just asks on the regulations, clear this up?

Mr Bell: Just to assist with a little background: This regulation was enacted because one of the office's investigators, during the course of an investigation of a Correctional Services matter, in a meeting with the deputy minister, expressed the investigator's opinion about the conduct of the official in question. As a direct result of the expression of that opinion, that person was transferred from the facility over which he had control to a significantly lesser position. The problem was compounded because the individual's name and the subject matter of the discussion, through nobody's fault, were made public in the press.

Ms Morrison, I do not know what organizations you are thinking of where the investigators have the ability to express their opinions or to advise in advance what recommendations they are going to be making to the ultimate decision-maker, but I can think of a number where it is not done and I can think of a lot of reasons why it should not be done.

Mrs Meslin, I am a little concerned. If your investigators are saying, "I don't have an opinion; I haven't formed a conclusion," they are not reading the regulation correctly. The regulation does not prevent your investigators from having opinions, formulating conclusions or making very strong recommendations. All it prevents them from doing is disclosing those to anybody other than the Ombudsman or the Ombudsman's delegate.

Mrs Meslin: John, I am reading it to say, "shall not express to anyone his or her opinion."

Mr Bell: Right. "Other than—" It does not say you cannot have one; it does not say you do not formulate one; it just says you do not tell anybody except the Ombudsman or the Ombudsman's delegate. That is there for a very important reason: so that your investigators can do the job of briefing the Ombudsman at a case conference, by memorandum or by an in-person submission.

Mrs Meslin: I understand that.

Mr Bell: I will give you a good parallel. If I were to be instructed by this committee to investigate and marshal the evidence on a particular significant issue that this committee was going to address, and if in advance of that I was offering my opinion, etc, or advising or indicating what I was going to be saying to my client the committee, notwithstanding the solicitor-client privilege I would think that would be an awkward way of carrying on, and I would think that ultimately the service that I would be performing would be diminished in some way.

Your word "dishonesty" is a little inflammatory. If your people are saying, "I don't have an opinion and I'm not going to express one," that is not entirely accurate. If your people said, "Yes, my job is to formulate opinions and make recommendations, but I am duty bound by regulation not to disclose them to you, only to the Ombudsman," gosh, I think people understand that.

One final point; you can respond to any or none of it. I am a little concerned that your investigators would be expressing opinions about an investigation which are not binding upon and may be totally opposite to what conclusion the Ombudsman ultimately arrives at. If you think you got have a conflict now, you are going to raise expectations every time you express an opinion which is favourable to the complainant, and if the Ombudsman comes down and says, "I can't support you ultimately," I think you are going to get more letters. I know the committee would.

Ms Morrison: Just a couple of points. One is that to some extent it is misleading to the complainants not to tell them what the investigator thinks of their cases. They often come back to us and say: "You've led us on. You've taken us all down this path," only to get, the next week or something, a nonsupport report from the Ombudsman.

More important than that, we are talking about an administrative fairness process here. We are saying to the complainant, "I want to give to you, as an investigator, the essence of the case against you." The complainant says to me, as investigator, "Okay, tell me what it is that you're going to recommend to the Ombudsman." You say, "I can't tell you that," and they say: "If you can't tell me that, how can I possibly respond to the case against me, because I can't see the way in which you are collecting these facts together and providing an opinion to the Ombudsman. If you won't tell me what your recommendation to the Ombudsman is going to be, I can't meaningfully give my argument back," in administrative fairness terms.

That is where investigators find it so awkward, because, as I said before, it is not just a set of facts that you are assembling, "On such and such a day you went so and so; on such and such a day you received a decision negative to your interests." It is much more the opinion that the investigator has about the way those facts relate which is going to be presented to the Ombudsman, and which the complainants feel is very difficult for them to respond to meaningfully if they do not know what it is.

So it is in that sense that our investigators have come to the Ombudsman and said, "Could you ask the committee about changing this regulation?" It is the investigators who have come forward with this request, because it is the investigators who feel they are put in a very awkward situation with complainants in trying to tell the complainants what the case is against them without actually giving them an analysis of what their opinion is.

Mr Bell: You have raised two issues. One is that they feel let down at the end of the process. If they understood what the process was from the beginning, while they might not totally agree with it, at least they would know that an investigator cannot share an opinion or a conclusion.

The other part, about administrative fairness: Do you feel prevented from providing to the complainant the facts that you have gathered during the investigation?

Ms Morrison: No.

Mr Bell: You can share those?

Ms Morrison: That is right.

Mr Bell: The complainants get 19(3)s?

Ms Morrison: Administrative fairness is the equivalent of the 19(3).

Mr Bell: Do complainants get 19(3)s?

Ms Morrison: The letter that we send as the administrative fairness letter is the equivalent of the 19(3).

Mr Bell: And that is sent by the Ombudsman?

Ms Morrison: No, it is usually sent by the investigator, but what it does is set out the facts that are adverse to the complainant, so that he or she can make any further comment prior to the final decision by the Ombudsman on the merits of the case.

Mr Bell: And that is sent out under the authority of 19(3)?

Ms Morrison: No, it is sent out under the general obligation to provide them with a fair opportunity to know the case against them.

Mr Bell: Why is that not enough, in terms of giving the complainant an opportunity to know what the facts are and even an opportunity to know what somebody thinks on a preliminary basis about those facts?

1120

Ms Morrison: It cannot be a summary of what the investigator thinks on a preliminary basis about those facts. That is what the regulation prevents. The investigator can summarize all the facts, but what he cannot say is, "And these facts look like...leading to this conclusion."

Often, in fact in many, many cases, we get the initial information from a complainant, which you would like to be able to say as an investigator, "If you don't have any more information than that and even putting all of your information at its very highest, that is, accepting absolutely everything you say, this is a nonsupportable case." We cannot do that. We have to go through the process of investigating, whether or not it looks as if accepting every point the complainant made would still lead to a nonsupport situation. The investigator is in no position to be able to make any preliminary assessment to the complainant of the strengths of the case.

Mr Bell: Why should they? I do not mean to be facetious. You have given us some reasons, but why is that to be a responsibility of an investigator?

Ms Morrison: I think I am not suggesting that it is the responsibility of the investigator to make the final decision in all of the Ombudsman's cases. But the reality of the situation is that the investigator is in the best position to know what the case is, to know the facts of the case and to discuss them meaningfully with the complainant.

We get many complainants who call up after they get a nonsupport report and say: "I want to talk to the Ombudsman. I want to discuss this case with

the Ombudsman." The reason they want to do that is that prior to the nonsupport report, they do not feel they have been given any meaningful analysis of their case. So once they get the final report, which does provide that analysis, they say, "I want to talk to the Ombudsman about this case."

All of that analysis and all of that information has been assembled by the investigator in the first instance. Had the investigator been able to be straight with the complainant in the first place and say: "Here's the information I've assembled. When you put this all together, it looks to me as if this person is telling the truth and that person is not telling the truth, and that's certainly going to be my recommendation to the Ombudsman, that he or she believe this side of the story and not that side of it." If that could be meaningfully explained to the complainants prior to their receiving a nonsupport report, we would not have the dissatisfaction, I feel, of complainants who feel that somehow they were never given an opportunity to counter the Ombudsman's analysis of the facts.

Mr Bell: Then why do you not just have the author of this administrative fairness letter, instead of the investigator, the Ombudsman, and give an analysis if the Ombudsman concurs in the analysis?

Ms Morrison: There are a couple of good reasons for that. One, it will delay the process substantially. The other thing is that this administrative fairness process is often a give-and-take process; it is not just "a" letter. Especially if it is done by telephone, it is a long discussion with the complainants about their complaint so that they get a reasonable opportunity to respond.

Many of our complainants are not very able to communicate by letter, and it does not make a lot of sense to send them an administrative fairness letter with all this analysis in it and say to them, "Now you write us a long, complicated letter back saying why you don't agree with that." We try to do these things in the most informal and the most appropriate way possible. Often that is not by virtue of a long and complicated letter; it is through a telephone conversation or a meeting face to face. I could not possibly schedule the Ombudsman's time in such a way that she could meaningfully give the same kind of information back and forth to complainants that is done by investigators on a daily basis.

Mr Bell: I guess we have got a couple of interests in the air. We have the interests of those people who have been or may be significantly prejudiced by the disclosure of opinions that are not so-called opinions available by statute. You have just said that many of the complainants could not cope with a letter process back and forth, that it takes some time.

I have some significant difficulty with an investigator saying to somebody in that circumstance, "It looks like I'm going to believe A, but I'm not going to believe B." No matter how much you may explain to that complainant that that is supposed to be confidential, I think in a good number of cases you are going to have that information communicated elsewhere, and probably to the detriment of somebody A, whose credibility the investigator is prepared to make findings against.

The courts have significant difficulty when they are into that circumstance and there are all sorts of protections afforded. I do not know how you build in enough protection against unnecessarily damaging the reputations and names of individuals in that process, because, unless you are telling me that every recommendation and finding that an investigator has ever

made in your office is supported or rubber-stamped by the Ombudsman, then you are going to have some problems, and those problems will probably become public problems.

As I say, where is the bigger interest: the administrative interest of the office in a relationship with the complainant, or the need to protect so-called innocent people? That is all I had.

Mrs LeBourdais: What I would like to ask about is not specifically in the report, but I am just reflecting back over the time I have spent on the committee.

Earlier in the year, I think we discussed some of the services that had been implemented to better serve the multicultural community, etc. I am just wondering if you have a sense that, by extending in more languages, etc, and in more areas of the province, that you feel that those people who are perhaps new immigrants, whose first language is not English, who perhaps have minimal education, are using the process? Are they feeling that they are well served by the process?

Mrs Meslin: I did not bring them with me, but I must say we have had numerous letters from various groups and individuals in the multicultural milieu that have been absolutely delighted with the ethnocultural officer we now have going out and trying to help people understand the process, and have thanked us for it. I think it is one of the most exciting things that the office is doing, because it is opening doors to people who do not even understand the Ombudsman concept, to understand that this is another area where they can go if they are having some difficulty with a provincial agency.

Mrs LeBourdais: Another group I guess I want to ask essentially the same kind of question about: I had occasion during the summer to visit a number of Indian reservations up in the James Bay area, and I saw lots of Ombudsman posters in almost every facility I went to. The native Canadians' experience up there is quite different from what we as southern Ontario people experience.

I want a sense of: Do they make a lot of claims? What kind of percentage go in their favour? Is there a sense that the claims are justified? Because the living experience just impacted on me, how different it was, how it is just seen to be different, and I am just wondering: Is that reflected in the claims that they make?

Mrs Meslin: First of all, I think that it has taken us a long time to win the trust of native groups, especially in the far north, that in fact we will honestly look at things; and through the offices of our native liaison officer, who has now been with us some four years and has developed relationships with the Union of Ontario Indians and all of the many groups, we are finally now seeing a great many requests and some complaints that we have been able to help and investigate. I think that they feel very good about it. It is not enough yet, because at this point we have one person doing the lot of it. We have another competition ongoing for a native officer who will be stationed in the north, actually in Timmins, who will assist with that work, but I must say that we are beginning to see a lot of complaints starting to come through.

1130

Mrs LeBourdais: I realize I am asking a question that asks you to

deal in almost vague generalities, but because of that distrust that many natives have, do you feel that some of their complaints are valid generally, or is it perhaps more of a misunderstanding of the system?

Mrs Meslin: I think they are probably no different from any other group which has difficulty understanding the concept of what the Ombudsman is and what the Ombudsman can do and what government agencies are and what they can do. You get a number of complaints that are not valid only because they do not understand the process, not because the essence of the complaint is not something you could look into.

They have—particularly native people, of course—a real difficulty in separating out what is federal and what is provincial, because you have status Indians and you have so many issues that they think should be able to be handled by the Ombudsman. As a matter of fact, they have come to understand the necessity for an Ombudsman and they have written to the federal government asking that a federal Ombudsman be appointed to handle their problems. They have the feeling that the provincial Ombudsman is a good thing and that a federal Ombudsman would be a great thing.

Mrs LeBourdais: Would even be better.

Mrs Meslin: Yes.

Mr Philip: I find it useful in your report to have the summary cases. I think that is a useful procedure which was started by Dr Hill and I think it gives people even in other jurisdictions an understanding of what is going on.

It would also be useful, though, in some of these cases where there is a lesson to be learned from the point of view of good administration, if you highlighted those either at the beginning or at the end. As I have said before, I think a series of Ombudsman's reports could eventually be put together that could act as a training manual for public servants: "Here are the kinds of problems that public servants sometimes make in terms of administration." I think that kind of system would be useful. I think it was a process that was started in British Columbia. I know Dan Hill was influenced by Karl Friedmann's reports and I think that might be useful if you might consider that in future reports.

I would like to look at the whole area of the expansion of the regional offices. I wonder if you can tell me: Do you have a set of criteria, measurements, if you want, that would help you to decide when you open up one regional office as compared to another? Is there some benchmark that says that we should put one in this community but not in that community which is 100 miles away?

Mrs Meslin: We do. If the committee is interested, I have the manager of regional services, David Sora, here who has busily developed a lot of those through studies and what have you. Dave, do you want to come up and maybe give the committee just an idea of how you develop those criteria?

Mr Sora: The criterion for where to open an office is largely on our initiative. Continuously we do demographic analyses of the population base in Ontario. Sometimes we look backwards at our complaint volumes and at where they are coming from: their origin. If we are getting a lot more complaints in a pattern from one general area, then we will start focusing on the area, normally in quadrants of Ontario: northeast, northwest, southeast, southwest.

We have already struck out territories for each of the existing offices, so we know where we are not covered.

I guess one of the general criterion that we use in trying to measure our regional service is the time or mileage from any point that we can be from a regional office in a circumference. What I try to do is ensure that we can respond to a person geographically within an hour and a half by road. So we are missing a couple of offices, I would suspect. But as for criteria, we do not have on a piece of paper specific written criteria, no.

Mr Philip: So it is kind of a gut feeling based on geography, volume and so forth.

One of the things I am always concerned about is that sometimes, because of the way in which a particular ministry is functioning or certain people in that ministry, there may be a flood of complaints. I am concerned that you then put in a regional office, and once you have resolved the offending parties or the offending processes, you still have that office there but a lot of the problems are corrected. Suddenly the ministry says, "A certain number of people are making these bad decisions and we better change what is going on." They correct the problem and suddenly your case load in an area hopefully dries up as a result of your actions. Do you have an ongoing monitoring of those regional offices with a view that perhaps it might be more useful to have them move from time to time?

Mrs Meslin: First of all, we would never establish a regional office on the basis of one ministry's record of maladministration. That would not be the basis on which to establish an office. I think as David said, you want to take a look at the number of people, the demographics, the cross-section numbers of complaints and issues that are raised in a particular community.

It may well be that you might have a community where you have one field officer and there is never a need to increase that number, whereas in another community regional office that you have set up, the complaints begin to mushroom because the area is so large, and once they realize we are there, we are just flooded. Then the question is, do you increase the staff in that office. We have not to date, other than originally four years ago when we decided to close an office, off the tops of our heads, I must say, and were forced by this committee to take another very good look at it and did reconsider it. We would not do it on that basis now at all.

Mr Philip: I guess one of my concerns is that unless you have something spelled out as to your criteria for setting up an office, then occasionally when you are faced with closing down an office, you are opening yourself up to criticism because there is no way of really saying, "You people in this community no longer meet the criteria and therefore, from our point of view, we would rather deploy our staff and our resources elsewhere." I think it would be useful if you tried to at least put it down on paper. I realize when you are dealing with the social sciences you are not dealing with physics. Even physics, after Einstein, showed there is a certain amount of relativity involved.

None the less, it might be useful to at least have something so that you--and indeed that the committee, faced with another situation just as we have had in the past--could say: "Here are the reasons why it was established. It proved not to be as effective as we thought and therefore it was a reasonable decision to close it," or indeed, "It was an unreasonable decision." But unless we have something to measure it by, inexact as those

measurements may be, I think you are opening yourselves up to future criticism similar to what you have had in that one instance.

Is the toll-free telephone service to Toronto still part of your regional services program or have you eliminated that as a result of some of the expansion?

Mr Sora: In fact, we have two toll-frees, an English and a French, both linked to our Toronto head office. They are not necessarily part of the regional service. In fact they are peripheral to regional. Our regional offices are intended in theory to cover those areas in a certain circumference. In those areas which cannot be easily covered territorially, a 1-800 number is placed in the telephone directories in those communities. But both lines are in fact operational.

1140

Mr Philip: Would you have the toll-free service, for example, where you would have part-time regional offices?

Mr Sora: I do not think we have part-time offices any longer. All our offices are full-time.

Mr Philip: So there are no longer any part-time offices?

Mr Sora: No. If you are referring to the original field offices, no, they are all full-time, storefront offices with the exception of North Bay, which is still a full-time office but it differs in scope. They are all full-time, so again the 1-800s are in conjunction with that.

Mr Philip: I wonder if we can talk for a moment about the storefront locations. As MPPs, from time to time we are faced with the idea, "Wouldn't it be nice to have our office in a storefront location?" The advantages are that you are more visible, usually, and that you are more accessible from the point of view of people who are disabled. The disadvantage, however, is usually one in terms of cost. With that additional money, can you be visible in other ways and/or can you have additional revenue to spend on additional staff who can make visits to people who cannot get out to your office or who have difficulty going up a flight of stairs or whatever?

Can we start off with each of the locations? How much more expensive is it for you to operate in a storefront as distinct from the premises that you had originally been in? Is there a difference in cost? Have you measured whether that is the best way to use the taxpayers' money?

Mr Sora: First of all, in each of the locations, prices will vary, obviously, by market value. In general, though, the operating overhead for an office would be roughly about $35,000 per year. Maybe Allan Mills could clarify that. As to difference from a previous location, as you know, in many instances in the field program we did not have a previous location; we started it up part-time in a house and rolled it out into an actual storefront office.

I think in the Ottawa case, we recently attempted to go more to a storefront. We were in a tower location, the seventh floor, with the inverse of the benefits you have noted, accessibility, visibility. We tried to relocate it to a storefront operation, which in fact started out to be a lower cost than the office space we held, but what it meant was moving out from the core and going significantly farther out in Ottawa to Ottawa west. That then

shifted the office way over geographically to one side of Ottawa.

In other words, there are times when we can go from a previous model in a tower, as we did in North Bay, to a storefront and reduce the costs rather than increase them. I do not find the operating costs relative to the service costs to be that much more. In fact, as I said, it is only—I am trying to think in a district office with two staff and a $100,000 operating budget—about $40,000 to operate that one office. That is for everything.

Mr Philip: That kind of surprises me. Just from my own experience in my office, I can get very much more space for a lot less money than I can a smaller office in a storefront. As Dr Henderson would tell you, the former member of Parliament for our area had what amounted to a ground-floor office, very small. The present member has the second floor with a lot more space. I assume they are spending somewhere around the same amount of money; they have a budget the same way as you and I do.

In some locations, it is terribly expensive to move into a storefront. I am just wondering whether you have done a cost-benefit analysis of moving into a storefront as distinct from taking those resources and putting them into other forms of outreach, which you talk about in your annual report, and perhaps additional ways of meeting the needs of disabled people who may not be able to walk up a flight of stairs or something like that.

Mrs Meslin: I think, Mr Philip, we do that analysis with each individual area and, as David said, they vary in terms of location. You are talking about Toronto in relation to your office. The majority of our offices are not in large cities. We gave exactly that consideration to the one that was in Ottawa and decided that it was not worth while to spend the money needed to put us in a storefront office in the core. We remained in the high-rise because we made that analysis. But in a place like Timmins or Sault Ste Marie or, as David said, North Bay, the difference was not only not greater, it was cheaper.

Mr Philip: So it was cheaper in Sault Ste Marie. Was it cheaper in London? In London you moved—

Mrs Meslin: In London we went—

Mr Sora: Second floor to first. No, in London it was not. London, in field evolution, was one of those oddities. It was a lot cheaper—I am trying to remember how much it was—to offer it on the second floor at the London Urban Resource Centre, but we certainly were not autonomous. We were fully dependent on other services: elevators, second storey, with the comings and goings of a lot of other people. We started to get into some questions about concern for confidentiality simply because of the setup and the design of the setup of the floor where we were.

We were sharing office space when we were in Windsor. I guess the costs in that case to move were a lot higher than staying where we were. But our assessment, our analysis, took us through 20, 30, 40 properties: second floor, ground floor, basement. I do not think we looked at anything higher than the second floor, if it was in a tower.

Mr Philip: When you go to look for a location, what kind of assistance do you have? Do you go through a rental agent, or what advice do you have in terms of lease arrangements or lease agreements? Are you dealing with local people who know the situation? Do you usually tie yourself into long-term leases, or how do you go about it?

Mr Sora: Our procedure has been, approximately three to six months in advance of even thinking about relocating for whatever reason, to contact two or three commercial real estate agents locally to start siting some properties for us. We give them criteria and, related to the other question, we do have a list citing criteria factors we are looking for which we describe to the commercial agents and they start looking for properties. They send us the information. We assemble all that information locally and then here start conducting an assessment, plus or minus, a way, so to speak.

What was the second part of the question?

Mr Philip: Do you try to go for long-term leases or short-term leases? Do you have good local analysis of the market to get you the best deal possible? That is another way of saying it.

Mr Sora: We tend to go with shorter-term leases than we used to. Previously we were locked in on many occasions to five-year leases with a five-year renewal. Our preference has been to shrink that down a bit to a two-year or three-year original lease term with an option of a two-year or three-year renewal. Right now, I set the specification at two years and two-year renewal. The next best would be two years with a three-year renewal, then inverse and all the different variations.

The logic is that we found in the past, when you speak about expenditure of money, that in order to sometimes adjust to local needs or what have you--we have grown or we have shrunk, we have increased or reduced services--or just to adjust to, for example, the needs of the handicapped, at times we were required to consider moving. When we were locked into long-term leases, we had in effect to buy out of that lease, discharge the balance of it if we wanted to seriously move. Now we are in a situation of having the two-year upfront lease with still an option. I think that just gives us greater flexibility.

Mr Philip: Does the restructuring, in your estimation, give the local office less autonomy than under the previous model, and is this good or bad? What is your opinion?

Mr Sora: I think that maybe even ironically, counter to that, it gives them more autonomy. Albeit we are just coming through the first transition from January until now, I guess theoretically if we can set in place the proper standards which, to my mind, were not always there--the standards, procedures and policies, everything that is needed to properly run a smaller office--it can make them more autonomous, much more independent and much more reactive in a local community without the guidance from here.

I think a lot of the problems in the past were related to a lack of all those things, not totally, but a little bit here and there, which made them more dependent on our head office in Toronto. In my opinion, this is going to make them more autonomous and more independent.

Mr Philip: Am I correct in saying that in the past if I went from one regional office to another, I would notice a difference of standards or approach, a difference of quality--I guess that would be a better way to put it--before you instituted this?

Mrs Meslin: I think that was precisely why we reorganized the structure. It was because we wanted a far better sameness in terms of the quality of the office, the high quality of service. Instead of one director or

regional director looking after nine offices and unable to check and monitor the work and quality, we now have two supervisors, which makes a great difference because they are setting standards with their manager which they are communicating to their regional offices. It allows for a community of interest also.

Along with that restructuring, we now have regional conferences twice a year in which we bring all those regional people together to update them, give them some staff development and make them able to exchange with each other the problems that may exist that they may find are common, etc. I think that the reorganization has been excellent, not only organizationally but in terms of the morale of those offices. Those people do not feel isolated any more. They have a supervisor who visits them on a regular basis; they have this link with Toronto; they meet regularly with their own groups and the larger group, and so there is a much more collegial atmosphere.

Mr Philip: I recognize that you are still in the process of developing some of the theory and processes of the new regional model, but is there some point in time that you have designated to do an internal audit or evaluation of the new model versus the old one, rather than simply the feedback that you get at these regional conferences and so forth?

Mrs Meslin: In fairness, as David said, we have now had this new structure with supervisors, etc, operational only since January. He has asked, and I have agreed, that it be given at least a year to get itself operational, and then certainly we will be doing an analysis of the old and the new.

Mr Philip: Will there be at any point in time an outside consultant not connected with the Ombudsman who will be doing an evaluation, or do you plan on simply doing internal evaluations?

Mrs Meslin: I would think that would be up to the new Ombudsman.

The Chairman: Mr Carrothers, do you think you can finish your line of questioning by 12 o'clock?

Mr Carrothers: I actually wanted to talk a bit about the regulation that we discussed earlier, but I think it has really been canvassed sufficiently, at least at this point, so I do not have any questions.

The Chairman: How about if we resume at two o'clock? Mr Bell will be first on the list. I assume that your questioning will be longer than five minutes. I think that is a good assumption. We will resume at two o'clock and then, after Mr Bell, we will go into statistics, if that is acceptable.

The committee recessed at 1154.

STANDING COMMITTEE ON THE OMBUDSMAN

ANNUAL REPORT, OMBUDSMAN, 1989

TUESDAY 19 SEPTEMBER 1989

Afternoon Sitting

STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)
VICE-CHAIRMAN: Bossy, Maurice L. (Chatham-Kent L)
Bryden, Marion (Beaches-Woodbine NDP)
Carrothers, Douglas A. (Oakville South L)
Cousens, W. Donald (Markham PC)
Henderson, D. James (Etobicoke-Humber L)
LeBourdais, Linda (Etobicoke West L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Substitution:
McLean, Allan K. (Simcoe East PC) for Mr Cousens

Clerk: Carrozza, Franco

Staff:
Evans, Catherine A., Research Officer, Legislative Research Service
Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon

Witnesses:

From the Office of the Ombudsman:
Meslin, Eleanor, Temporary Ombudsman
Zacks, Michael, General Counsel
Morrison, Gail, Acting Executive Director
Penfold, Kathy, Investigator

LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON THE OMBUDSMAN

Tuesday 19 September 1989

ANNUAL REPORT, OMBUDSMAN, 1988-89
(continued)

The committee resumed at 1406 in committee room 2.

The Chairman: Mr Bell had some questions he wished to pursue.

Mr Bell: Mrs Meslin, can we talk for a few minutes about the applications pending in the Divisional Court to determine jurisdiction?

Mrs Meslin: Yes.

Mr Bell: At page 7 in your annual report, you make reference to that. I do not think the committee has been made aware previously of the issue involving the board of radiological technicians. Has counsel been retained on your behalf and an application filed?

Mrs Meslin: Yes.

Mr Bell: Has the Attorney General (Mr Scott) taken a position formally in this application?

Mrs Meslin: In the radiological one?

Mr Bell: Yes.

Mrs Meslin: No.

Mr Bell: Do you know if the Attorney General will?

Mrs Meslin: Not to our knowledge.

Mr Bell: The Ministry of Financial Institutions: You have told us about it before, and Dr Hill before you had expressed his concern as to the implications of finding adverse to the Ombudsman's current position. Has the Attorney General taken a position in this case?

Mrs Meslin: Yes.

Mr Bell: Has the Attorney General decided to intervene?

Mrs Meslin: As far as I know.

Mr Zacks: Yes.

Mrs Meslin: Yes.

Mr Bell: And filed a factum?

Mr Zacks: I have not seen it yet, but I imagine the Attorney General will file a factum, if he has not already.

Mr Bell: What do you understand the Attorney General's position to be in this application relative to the position of the Ministry of Financial Institutions?

Mr Zacks: The Attorney General has given legal advice to various ministries, and in the case at hand the Ombudsman has no jurisdiction to investigate, because the decisions taken by public servants were pursuant to orders in council or regulations and accordingly, the Ombudsman lacks jurisdiction to investigate, because the Ombudsman Act prevents the Ombudsman from investigating the deliberations and proceedings of the executive council and its committees and, therefore, because the Ombudsman in conducting those types of investigation may be put in the position of criticizing the order in council or the regulation, he indirectly or directly will be in a position to criticize deliberations and proceedings and therefore he has no jurisdiction.

Mr Bell: I want to be assiduous and not get into the merits of the various positions, for obvious reasons, because it is before the court. But is it your understanding that the position of the Ministry of Financial Institutions assumed and taken in this application, is consistent with the opinion given to that ministry by the Attorney General?

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Mrs Meslin: Yes, they are relying on the opinion of the Attorney General.

Mr Bell: Do you have any views about the role the Attorney General is playing or taking in this application?

Mrs Meslin: None in particular, unless you want to be a little clearer.

Mr Bell: Do you have any views as to the role the Attorney General is taking, which is a position adverse to the position of your office as to jurisdiction? I am not asking you to comment on the merits or the lack of merit of this petition—

Mrs Meslin: No, I understand.

Mr Bell: —just as to the adopting of that position.

Mrs Meslin: Not really.

Mr Bell: Okay. Members of the committee: Almost 10 years ago to the day, as a matter of fact, one of your predecessor committees in its seventh report, in 1979, made comment with respect to the role of the Attorney General in these types of situations. The facts in that circumstance were that the Health Disciplines Board challenged the jurisdiction of the Ombudsman and, as has been done here, the Ombudsman made an application to the Divisional Court to have that jurisdiction determined.

To extend that story, that decision initially by the Divisional Court was appealed to the Court of Appeal and the jurisdiction of the Ombudsman was confirmed at both levels, but ultimately confirmed by the Court of Appeal, over the Health Disciplines Board, by Mr Justice Morden. In that case, the Attorney General did participate in both levels, the application and the appeal to the Court of Appeal, and filed factums in support of the position then taken that the Ombudsman does not have jurisdiction. The Health

Disciplines Board, on appeal, literally adopted the factum of the Attorney General in support of its position.

Your predecessor committee, because examining the role and relationship of the Ombudsman to the Legislature and the Ombudsman to the Attorney General, expressed some views of whether the Attorney General should be assuming an adversarial position adverse to either a ministry or an Ombudsman, as the case may be, in a circumstance of a jurisdictional dispute, or whether the Attorney General should adopt an amicus curiae role to assist the court as and when appropriate.

I just raise that and remind members of the committee of that circumstance, which is why I have done it with you, Mrs Meslin, to see if you had any comment, but I think you have been forthright in your answer.

Could you undertake to provide the committee through me with a copy of whatever proceedings are available now, the notice of application and any factums that are available, just so the committee can have a record of the positions taken both by your office and those who are in opposition to you?

Mrs Meslin: Sure.

Mr Bell: Any idea when those applications are likely to be heard?

Mr Zacks: I have been told they will be heard some time in the fall, with any luck. Our counsel cannot be more specific than that.

Mr Bell: I think in the circumstances it is wise not to make any further comment about the application lest we slip into one on the merits, etc. Can I just cover off a couple of matters that were raised this morning?

Your regional offices: Do I understand that the substantive investigative functions are still undertaken in Toronto, centrally?

Mrs Meslin: Yes.

Mr Bell: What is the role of a regional office in an investigation of a complaint?

Mrs Meslin: Primarily, it is intake; the complainant comes into the regional office. The regional field officer puts together as much information relating to the complaint as he or she can and sends it off to head office. If it is jurisdictional and an investigation is going to proceed, if the investigator has to go back out into the region to interview governmental personnel or individuals, he takes with him the field officer so he is updated on the situation, and he is sent copies of any correspondence that occurs with the investigator and any parties to keep them updated.

Mr Bell: Did anybody ask you this morning--I do not recall--about North Bay? Do you still have a North Bay office?

Mrs Meslin: Yes, we do.

Mr Bell: What is the status of that office?

Mrs Meslin: It has a field officer, and it is now the same as any of the other field offices. It is no longer part-time; it is full-time.

Mr McLean: Is it in a house or is it a business office?

Mrs Meslin: No, it is a storefront.

Mr Bell: I asked a similar question of I think all the people who have held your position, both permanent and temporary, in the past. It is a time for moving forward in terms of the office; presumably there will be a new individual holding that position in the very near future. What advice do you have for the committee with respect to the relationship with the future Ombudsman? Is there anything that needs working on or anything you would like to see the committee emphasize?

Mrs Meslin: Certainly, the primary emphasis, as has been repeated in annual report after annual report, is the amendments. This committee can do far more for us in attempting to get the government to put those amendments forward and hopefully bring them back to this committee for discussions.

I would say that the committee has been an extraordinarily co-operative one. The one thing I would hope--and I think the committee made an effort this time--is that when cases come before it that are extremely complex, somehow the committee attempt to have its sitting members who are present when the positions are put to continue through that particular case, so that when they have to make their decisions they do it fully informed. I know it is difficult sometimes, because committee members have to be called out for other matters, but it becomes very difficult for us not to be able to address the committee and make our arguments to the same people through one case.

Mr Bell: I do not have any further questions.

Mr McLean: That is an area I wanted to start with, just where Mr Bell left off: the jurisdictional amendments you were looking for the Attorney General to deal with. Could you refresh our memory and bring us up to date on what those amendments were and where they are at? Well, we probably know where they are at.

Mrs Meslin: You said "jurisdictional," and it made me wonder whether you thought about expanded jurisdiction. That is something entirely--

Mr McLean: No.

Mrs Meslin: I mean just our regular amendments?

Mr McLean: The amendments to the Ombudsman Act.

Mrs Meslin: We made a series--not only us; former ombudsmen have made a number of requests for changes in the act, both in a housekeeping sense and overall with some new amendments. The former Ombudsman, Dr Hill, added some to it. There are approximately 18 or 19. In terms of substantive amendments, there are probably four or five that are other than housekeeping amendments.

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We had met on a number of occasions with the Attorney General and his staff vetting some of the problems in those amendments. Over the past two and a half years, we have been satisfied that the amendments we had requested were in the Attorney General's hands and would be put forward. That is as far as we have gone.

Mr McLean: The problem I have is that it sometimes can get rather frustrating when this committee makes a decision based on what it has heard in committee, all the facts presented to it, and it makes a decision to make an award; then it goes to the ministry and it says no. I just do not understand how that can happen. If you have a majority of government members on a committee, I guess they are given their marching orders, so to speak. However, that has not always been the case. This committee has kind of been nonpartisan. It has acted with evidence as presented before it and it has continued to do that.

I cannot see why, when a committee of this Legislature makes a recommendation, that recommendation should not be accepted. Is there an amendment that you are talking about that would solve that problem?

Mrs Meslin: One of the major amendments is the ability for an agency to make ex gratia payments, and that would go a long way towards solving some of the issues where a governmental agency said: "We'd like to pay but we can't. We have no authority." We think that would be one of those areas you are talking about.

Mr McLean: But to date there has been no action on those amendments? Then perhaps what this committee should be doing is putting some pressure on the Attorney General's office to try to get him to deal with those very important amendments.

It is really hard for this committee, and I have sat on it for quite some time before, to deal with an issue and have it go to the ministry and have it simply sit there and say no or not deal with it. It is frustrating, and it has got to be awfully frustrating for you people, when you go through all this work and all the background work and win your case, so to speak--you put your case before the committee and it believes it is the right route to go--and then the government does not follow through.

The other area I wanted to talk about briefly, what I wanted to bring up this morning, is with regard to comparative numbers. Is that on the agenda now? Can we discuss that now?

The Chairman: I was going to move right into statistics now, but Mr Philip asked to ask a few more questions, and then I--

Mr Philip: I am willing to stand down my questions, deal with stats, and then if there is time left I will go into some other questions on the Ombudsman's annual report.

The Chairman: I believe, Mr McLean, Ms Morrison wanted to make a presentation first, and then your questions?

Mr McLean: That would be just fine.

The Chairman: My only closing comment: Inez Knudson, is she with North Bay?

Mrs Meslin: Not only is she no longer with North Bay, she is the new supervisor.

The Chairman: Yes, I am noticing that, because I cannot believe there are two names like that in Ontario, and I remember once--

Mrs Meslin: She was not in North Bay, she was in Thunder Bay.

The Chairman: Maybe it was Thunder Bay. I remember her hospitality when I was there on a community event. She kept me at her home overnight and served me enough lasagna for a dozen people. I knew she knew a lot of people in the community as well. If that is a reflection of some of the people you are choosing, then I am sure things are running well.

Mrs Meslin: Thank you.

Ms Morrison: I am just going to make a few opening remarks about our statistics and then give you a brief explanation of some of the steps of our process.

Before I begin, you have been handed three new pages for your binders for the case of Ms W: pages 3, 4 and 37. Can you replace the other pages numbered the same way with those and destroy the earlier pages, please. We thought we had an eagle eye on the identity of the complainant, but we have made an error. Please destroy the pages that you replace. Thank you.

As you have heard in the introductory remarks of the Ombudsman, the number of persons contacting us in the past fiscal year is up substantially from just over 21,000 to almost 25,000. In the next few minutes, I would like to review for the committee the components of this change and the changes in various areas of the office's work.

As you know, the number of contacts registered with our office includes a number of matters which we classify as nonjurisdictional. These may be complaints about organizations over which we have no jurisdiction or they may be classified as nonjurisdictional because they do not, in some other respect, meet the requirements of the Ombudsman Act.

One of these requirements is that complaints be in writing, so complaints received in any of our offices by telephone are classified as nonjurisdictional complaints. As you are aware, we have improved and expanded our presence in the various regional areas over the past few years. We now receive many informal and telephone contacts in these offices, resulting in an increase in the number of contacts, although not necessarily in the number of jurisdictional complaints.

Someone this morning asked about the 1-800 numbers. We have three English-speaking 1-800 lines and one French-speaking 1-800 line, and all the contacts we receive on those lines are also classified as nonjurisdictional contacts.

We also provide outreach services through the regional offices which advise citizens of our services and encourage them to contact our office for information or to lodge a complaint. All of these initiatives lead to a steady increase in the number of people contacting our office year by year.

As you will see from the information we have compiled as a supplement to the statistics presented in the annual report--and this is the back page of what I handed out--the number of closed jurisdictional complaints in the 1988-89 fiscal year is down by just over 1,000 from the number a year earlier. A closer view of the data in the centrefold of the annual report indicates the areas in which this drop is most noticeable.

The most obvious change is in complaints against the Ministry of

Correctional Services. Jurisdictional complaints dropped from almost 3,000 to just over 2,100, accounting for most of the total change in jurisdictional closings. Much of this change reflects the new method by which our office deals with complaints from correctional institutions.

As you are no doubt aware, over the past two years telephones have been installed in provincial correctional institutions for the use of inmates in contacting their families, their lawyers and of course the Ombudsman. In that period, it has been necessary for our office to set up an entirely new system for dealing with inmate complaints. Instead of responding only to blue envelopes, the special envelopes provided by our office to the institutions to ensure confidential correspondence with inmates, we must now be prepared to answer dozens of telephone calls daily and to provide the best response possible to these calls.

This approach affects our statistics in a notable way since complaints received by telephone are, by their very nature, nonjurisdictional. We have developed excellent networks of contacts with staff in institutions and in the ministry so that we can resolve the concerns raised in most telephone calls very effectively with a few calls of our own, but these do not show up as closed jurisdictional complaints. That is why the number of jurisdictional complaints from institutions appears from the statistics to have dropped remarkably and why we are not concerned that that drop reflects a reduction in the important work of our office.

Two other areas indicate notable changes in numbers. The number of complaints against the Social Assistance Review Board is down by about one quarter, a reflection, we believe, of the changes that have taken place in that board's dealings with applicants.

Workers' Compensation Board complaints are down by about one third, but total Ministry of Labour complaints are up by almost two thirds. These figures reflect not only the change in procedures which make the board's decisions appealable to the Workers' Compensation Appeals Tribunal, but also the completion of litigation between the Ombudsman and the Ontario Labour Relations Board. We no longer need to hold complaints against the board in abeyance since our jurisdiction over its decisions has been affirmed.

1430

As was reported in our last annual report, a study of our statistical collection and reporting methods was undertaken during Dr Hill's tenure as Ombudsman. This report has resulted in improved attention to the accuracy of the collection of data and more confidence in their overall accuracy. It also highlighted the necessity to provide your committee with a good idea of the process of an investigation and the areas in which delays can occur.

I have attached to the statistical summary you have received an outline of the investigative process. I would ask you to look at this diagram now while I briefly explain some of the time frames involved in the steps outlined in the chart. Once I have completed my general explanation, I will of course be willing to answer any questions you might have. I trust, while looking at this chart, you will have your reading glasses on since the reduction of the print makes it almost impossible to read.

If you begin at the top of the chart and work through it, the chart essentially shows all the decisions which must be made on a particular complaint at our office. You will see at the very top that a complaint can be

received in a regional office or in head office in intake. This chart deals with essentially jurisdictional complaints received by letter.

The nonjurisdictional complaints or requests for information are dealt with at the top right-hand side of the chart and are finished with the word "closed" at the very top right-hand side of the chart. They go "intake co-ordinator decision," then over to the right, "nonjurisdictional," "referral information" and "closed." That very top part of the chart, on the right, is the information about nonjurisdictional complaints.

As you know from the figures, those nonjurisdictional complaints amount to a very large percentage of the number of contacts that we receive. But in terms of process, the process involved in nonjurisdictional complaints, as far as the number of different decisions that must be made in dealing with them is concerned, is quite short compared to that shown for the jurisdictional complaints down on the left-hand side and the remainder of the chart.

With the jurisdictional complaints, they come in through the intake area. They are assigned to an appropriate team. You will see a square on its end, a cornerwise square, which says "appropriate team decision." From there, a decision is made as to whether it will go through the normal channels, through "research and investigate" and down the centre of the chart, or whether it needs some special attention and is brought to the attention of the director of investigations prior to the investigation.

The "research and investigate" square, which is right in the centre there, is the heart of the matter in terms of the work of our office. Prior to an investigation, of course, we must notify the government agency that we are going to investigate a complaint. That notification takes place by what we call our section 19(1) letter. There is often quite a long time period between the sending of a 19(1) notice, the receipt of a reply from the ministry and the initiation of the research and investigation on a complaint.

There can be a number of reasons why there might be some delay in that area of the investigation. Quite often, a ministry must send out to its field offices for the necessary information to respond to our complaint, and in many cases it does not make sense for us to begin our investigation until we have actually received whatever information the ministry wishes to provide.

Many of our cases will resolve in an area near the receipt of the information from the ministry; that is, having notified the ministry of our intention to investigate, it may respond with some information which allows us to satisfy the complainant and close the complaint. In most cases, with most ministries, we prefer to wait until we hear from the ministry before we initiate our investigation.

The investigation then goes through a number of stages, as you will see from the chart. The research is done. If the research tends to suggest that the complaint will not be supported, an evaluation is done of the investigation, and you go over to the left side of the diagram to the nonsupport branch. As we were talking about this morning, we must be careful that prior to making a decision that would result in the nonsupport of the case, the complainant has every opportunity to know the case against him.

The rectangle on the left-hand side of the page that says "AF/NSR" refers to the administrative fairness process we were talking about this morning in which the complainant is provided with the information obtained in our investigation so that he may make representations to the investigator and hence to the Ombudsman as to why his case should be supported.

Again, the time frames can be quite substantial. It often happens that a complainant will ask us, for example, to give him a few months to answer an administrative fairness letter because he feels that he would like to collect some more information and would like to give the matter serious thought and provide us with a careful letter, or whatever his reasons may be.

There will often also be situations in which the complainant is away for some reason or ill or for other reasons does not feel he wants to proceed with involvement with our office at that time and will ask us to hold his file in abeyance until he has had an opportunity to respond to it.

The cases you are most used to seeing, of course, are the recommendation--denied cases. Those are the ones that go through the long chain of events, which goes down the right--hand side of the page. Those complaints involve the original research, investigation and evaluation of the situation which would tend to suggest there might be some support for the complaint.

There will often be a preliminary case conference, which is a preliminary meeting of the investigator and perhaps the assistant director and perhaps counsel, to decide whether the matter should be brought forward to a case conference, in which the Ombudsman, general counsel, director of investigations and various other members of the staff participate.

An evaluation of that process--and part way through the chart you will see the numbers "19(3)," which is the letter we send to the ministry or governmental organization in which the Ombudsman sets out his or her tentative conclusions and recommendations to that ministry and asks the ministry or governmental organization to provide representations to him as to why he should not support the complaint.

At that point we often have cases which resolve themselves. Once the ministry has been provided with our tentative conclusions and recommendations, it may respond with a letter which says: "We agree completely with what you have found. We would like to make things right." They may send in a letter with representations in which they disagree with us entirely, in which case those representations are part of the next decision--making process. There may be a meeting between the Ombudsman and members of the ministry or between Ombudsman staff and ministry staff, depending on the kinds of information that is to be passed on.

Once we receive that information, a second case conference is held in which, again, a decision is made whether or not to support the complaint. At that point, the decision may be not be to support the complaint, in which case the administrative fairness process has to be undertaken with the complainant, providing the complainant with all the information obtained to date and giving the complainant an opportunity for input into the final decision.

The bottom part of the chart is the part that leads to consideration by this committee. If, having received the representations of the governmental organization, the Ombudsman is not convinced by the ministry's point of view, he or she may go ahead in a second case conference to decide to support the matter. At that point, a section 22 report is drafted and sent to the ministry in which the final conclusions and recommendations of the Ombudsman are set out.

As you know from the legislation, the ministry is allowed time to respond to that final report. Sometimes they will respond positively and say, "We agree with what the Ombudsman says," and they will implement the

Ombudsman's recommendations. At other times, as you are aware, they will say they will not do that, and that starts the long process into the standing committee. By this time, it will often be many months from the time the complaint was initiated, as all these steps would have to be gone through prior to the consideration by your committee of a situation in which a ministry denies the Ombudsman's recommendation.

I think just going through the process and the various steps involved may give you some idea why it takes sometimes a number of years to finalize a complaint. The one which is probably the most indicative to this committee of why it might take a long time is the case which has been before you quite recently, Farm Q, in which you can get some idea of how long and involved the investigation and the various discussions with the ministry can be.

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According to our own statistics, checking on the duration of our cases during the 1988-89 fiscal year, more than 3,000 of those 3,500 jurisdictional complaints were closed within one year of receipt. Approximately 86 per cent of the complaints that are jurisdictional and require investigation are closed within a year. So it is not every case that goes the long, involved route of Farm Q.

I would be pleased to answer any questions that you might have at this time about our process or the statistics that are in the centrefold of the annual report.

Mr McLean: I have about three areas I want to question you on. With regard to the Workers' Compensation Board and the Ministry of Labour, the Labour figure is up drastically. I am wondering what the reason for that is. You have indicated part of it in your report, but I do not think that is all. Can you expand on that?

Ms Morrison: We are now receiving increasing numbers of complaints against the Workers' Compensation Appeals Tribunal. At the very beginning of the tribunal's existence, there was a fair length of time during which we received no complaints, because the tribunal was just getting off the ground and people were waiting for their initial decisions. Although we got some complaints about the delay in the decision-making process, we did not get any complaints about the decisions themselves.

That has now changed. As the tribunal puts out more decisions, as you would expect, we have more people who disagree with its decisions. So we are getting a fairly rapid increase in the number of WCAT complaints. Those appear under that area.

Mr McLean: Of the almost 25,000 closed complaints and information requests, how many of those would be phone calls?

Ms Morrison: It is difficult for me to say exactly. For the fiscal years 1988-89, I have just been provided with some information: 10,437 of the 11,000 total inquiries were inquiries by telephone.

Mr McLean: So there were about 1,000 by letter.

Ms Morrison: We have almost 300 by letter and about 600 by interview. We do get quite a number of people who drop into our offices in various areas.

Mr McLean: The unsubstantiated have increased; those are the complaints for which you cannot really substantiate what their complaints are. You are getting more letters from people complaining, letters in which they cannot substantiate whether it is their employer or who they are complaining about.

Ms Morrison: The unsubstantiated have increased somewhat from 1987 to 1988, from 365 to 411. Is that the figure you are looking at?

Mr McLean: Yes.

Ms Morrison: It may show a couple of things. The fact that we are now dealing with a lot of complaints by telephone, which do not end up being fully investigated but we do end up resolving them, affects the total number of complaints we have. A lot of those complaints are not, therefore, in the statistics that we see here for jurisdictional complaints. I am not sure whether that is allowing us a higher number of full investigations which turn out to be unsubstantiated complaints.

The other thing, of course, about unsubstantiated complaints is that we do not really have any control over what kinds of complaints people bring us. It might turn out some year by some fluke that all the complaints that people bring us are not complaints that can be supported. That would be pretty surprising, but we do not really have any control over what people bring us as complaints. The fact that they are up somewhat I do not think is a very significant statistic.

Mr McLean: What would your percentage be, in the last two years, of complaints that have not been resolved?

Ms Morrison: I think it is difficult except in terms of—

Mr McLean: How many would be over a year old?

Ms Morrison: In terms of over a year old, of the 3,500 jurisdictional complaints closed in the last fiscal year, 3,000 were closed within a year, so in a regular process that would leave about 500 of the closed complaints over a year.

In terms of not resolved, the not-resolved jurisdictional cases in 1988-89 were about 2,400 cases. Those will include cases in which the recommendation has been denied by the ministry or for various reasons the matter just has not been resolved. In the figures I gave you on comparative closed complaints statistics, the 1,059 that were resolved were resolved in two ways: one, through our involvement—that is the 900 and some—and two, 145 were resolved just by themselves; something happened.

Mr McLean: How many would you have over five years old?

Ms Morrison: In 1988-89, there were 100 complaints that were four years old or more closed in that period. Those were all complaints relating to a financial institutions investigation that closed that year, an investigation that was very similar to the Argosy investigation. It is really only complaints of that type that we would expect to last that long.

Mr Pollock: You mentioned that you write to the ministry and wait

for its response back. Do you ever go ahead and start investigating a case before the ministry responds back?

Ms Morrison: We do in a couple of different kinds of cases. With some ministries, either through our experience or with the agreement of the ministry, we have come to know that there will not really be much resolved through its response; that is to say, it will provide us with the file but it is not going to give us any information that is going to make much difference. With some ministries, we have an agreement that we will not await a response, that we will just go ahead with the investigation.

There are some instances as well in which we say to the ministry when we write to it: "This is an urgent case. If we don't hear from you within a few weeks, we're going to begin our investigation anyway." That will happen in some cases as well.

Mr Pollock: But by putting that in there, does that make them respond a little quicker or does it have any bearing on it at all?

Ms Morrison: It may make them respond more quickly. Sometimes what will happen is that they will respond more quickly but their response will not say anything very useful.

Mr Pollock: I see.

Ms Morrison: I guess it is a sawoff.

Mr Pollock: Yes. Thank you.

Mr Philip: One of the interesting statistics is with regard to psychiatric hospitals, in which there are only four complaints that would be under section 18. Does that suggest to you that most of the complaints coming from psychiatric hospitals tend to be substantial or supportable in some way, or at least that they are not frivolous or unfounded, that there is some merit to those cases as compared to some very large numbers that you have under section 18 for other ministries?

Ms Morrison: I think section 18 arises in a number of different ways. It is not always—in fact, it is very rarely—because a complaint is frivolous and vexatious that section 18 is used. Section 18 will often be used when we have obtained all the information we can in a particular complaint, which essentially satisfies the complainant, but we are not going to go to either a nonsupport report or a supported situation and for various reasons we discontinue the investigation.

I do not think it necessarily deals at all with the frivolous and vexatious nature of the complaints. For example, I think one of the statistics that is interesting this year is that we got many fewer cases that were abandoned or withdrawn than we used to have. That is both in the corrections area and the psychiatric area. I think a lot of that reflects the ability to deal with cases through a quick telephone call rather than going through the whole process and losing the complainant in the process, especially, I guess, in the corrections area. We will have abandoned or withdrawn complaints because the complainant moves on to bigger and better things before we can get his complaint resolved.

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Mr Philip: There seems to be very little fluctuation with the exception of the ones you mention in your report with regard to the Ministry of Labour from 1987-88 to 1988-89, with the exception that there seems to be a consistency of large numbers of section 18s under Correctional Services. I am wondering what the nature of the section 18s are since you have three grounds on which you would use the section. Are most of them under subsection 18(2) of the act?

Ms Morrison: I think most of the corrections section 18s relate to a situation where the matter was of urgent concern to the complainant while he was in an institution, and once he is moved to another institution it is no longer a matter of concern although he may say it still matters to him. The Ombudsman may exercise her discretion not to continue to investigate because it is no longer a matter that relates personally to the complainant.

Mr Philip: So if he or she gets transferred to another institution, he or she may not withdraw the complaint on the grounds that it is still important to his or her buddies, but then he or she falls under clause 18(2)(c), I suppose, and then you do not proceed further. Is that correct?

Ms Morrison: That is one of them. I am just reminded by one of my colleagues that one of the other uses of section 18 in corrections, which is very different from its use in a lot of other areas, is that there is an administrative remedy for many corrections complaints through the superintendent. Because of the fact that the complainant can go, and in fact must go first to the superintendent if there is an adequate administrative remedy, a lot of those complaints will be referred there first and closed by section 18. If they are not resolved there, they may reappear.

Mr Philip: So you may get some of the section 18s the following year if the person is still in jail.

Ms Morrison: That is right.

Mr Philip: I guess what I find confusing is your statement on page 24 of your report concerning the Ministry of Labour, because if I understand you correctly, the decision or the dispute with the Ontario Labour Relations Board has now been resolved and therefore one would expect that there would be more complaints about the labour relations board since people now feel you do have the power to investigate. Am I missing something in your statistics under the Ministry of Labour? I do not find the labour relations board listed.

Ms Morrison: It is not listed as a separate organization. It is under "total labour."

Mr Philip: It is under "total labour" and you distinguish—

Ms Morrison: And not Workers' Compensation Board.

Mr Philip: In other words, I have to subtract "Workers' Compensation Board" from "total labour" to come up with a figure that is probably close to what the labour relations board figure would be.

Ms Morrison: There will be a number of other complaints against the Ministry of Labour.

Mr Philip: I recognize that but I will probably get a fairly close figure if I do that.

Ms Morrison: Yes; 158 is the figure there compared to 97 a year earlier.

Mr Philip: Am I correct in saying that the major complaints against the Ontario Labour Relations Board are not with the substance of the decisions but rather with the process and the length of time it takes to get any kind of decision?

Ms Morrison: A number of them are process complaints but I think we get quite a few substance complaints as well. In this particular fiscal year that is reported in this annual report, we would have closed most of the complaints that had been been held in abeyance during the litigation, so I am not sure whether you can expect that the increase we see here will be reflected in another fiscal year. Those complaints were held in abeyance and then investigated once the decision came down.

Mr Philip: In your opinion, is there still a systemic problem at the labour relations board in terms of the length of time it seems to take to get any kind of a decision out of that body?

Ms Morrison: I could not comment without going back to our statistics.

Mr Philip: I hope that may be something the Ombudsman would take a look at because it has been a problem in the past. I recognize that there were certain specific reasons why Judge Abella said there were problems, but I think it is important that we find out whether or not those problems have been corrected.

It would be useful to find out exactly how long it is taking for the labour relations board to deal with the matter, because I think there is the matter of basic fairness. A lot of the people who are affected are often in jobs that do not always last all that long or they move on to other companies. They are often low-wage earners. At all the bodies, that and the Workers' Compensation Board, you have to have reasonably quick decisions made because these people just cannot hold on in the way that somebody else may be able to hold on awaiting a decision. You may want to look at that further and maybe get back to us during the estimates on that question.

Am I correct in saying that you would not yet feel any positive or negative effects of the new Workers' Compensation Act?

Ms Morrison: That is right.

Mr Philip: The legal aid clinics and certainly my own staff are reporting increases in volume as a result of the new act, but it will probably take a year and a half or longer before you feel any effect of that.

Ms Morrison: That is probably true.

Mr Philip: An area that I am always interested in, although we do not seem to have made any kind of impact on it, is the problem of the nonjurisdictional complaints. It would be useful if we could somehow break it down as to nonjurisdictional, such as federal, particularly for our northern

people. It seems to me we have a major problem in that a lot of the people who are coming to you——

Ms Morrison: We do have a breakdown on.

Mr Philip: There is a need for a federal Ombudsman. Dan Hill has made that point and other provincial ombudsmen have made that point. It just seems a shame that your office has been bogged down with these cases.

Ms Morrison: On page 25 of the annual report, there is a disposition of nonjurisdictional complaints, information requests and submissions in which you can see the federal ones. The ones labelled clearly federal are 8.1 per cent of the total.

Mr Philip: Under the municipal category, do you include complaints against hospitals under that or would that be under a different category? Would that be under the "other" category? If somebody complained to you about the treatment he received at a community hospital, would that figure appear under "other" or "municipal"?

Ms Morrison: I think they would appear under "private," in the way we have presently categorized them because there is a board of directors and all the characteristics of a private organization there.

Mr Philip: I guess you would have no way of pulling out how many complaints you would have received in the last fiscal year about hospitals that you would not have the power to investigate.

Ms Morrison: I think we could, actually. We might have a way of doing that.

Mr Philip: That might be interesting.

Mrs Meslin: I think we did it for the expanded jurisdiction.

Mr Philip: We did it for the expanded jurisdiction, but I am wondering if you have any update.

Mrs Meslin: We were able to do it. We just have not done any more because we left it at that.

Mr Philip: I guess people are getting used to the fact that you do not have jurisdiction over them.

Mrs Meslin: Yes. Certainly they are told that all the time.

Mr Philip: Has the dispute with the Ontario Labour Relations Board had an impact on any other body that you know of, or have you had a similar complaint now that is resolved?

Mrs Meslin: We have the radiological technicians——

Ms Morrison: The board——

Mrs Meslin: ——the Board of Radiological Technicians, which is exactly the same complaint. It is now going to Divisional Court. It is reported in our annual report.

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Mr Philip: So the decision on the labour relations board has not affected that other outstanding one?

Mrs Meslin: I guess they feel they are different.

Mr Philip: Are there any others that are in a similar category at the moment?

Mrs Meslin: Not that I have knowledge of.

Mr Philip: No one at the moment. Nobody else is challenging your jurisdiction.

Mrs Meslin: No, not in that sphere.

Mr Philip: Other than the Attorney General (Mr Scott).

I had some questions on the report but not on the statistics, so I will bow to other members who may have questions on the stats.

Mr Bell: Can we spend a little time on the pages in the report, particularly pages 23 and 24. There are three areas, Ms Morrison, that I would like to address. One of them may have already been answered as a result of a question by Mr McLean. Under the "investigation discontinued" categories, the comparative total for the two years shown, in the previous year there were 812 in that total category and that is now reduced to 283. I am looking at the total statistics at the bottom.

Ms Morrison: This is "withdrawn" complaints; am I correct?

Mr Bell: The general category is "investigation discontinued."

Ms Morrison: There are three different categories.

Mr Bell: All right. Under "withdrawn," the previous year it was 812, and that is reduced substantially now to 283. Is anything happening, from your experience, that has brought that down a significant degree?

Ms Morrison: The main change there is again in the corrections area. If you see, it has gone from 585 to 125. Most of that will be attributable to the fact that when we could not deal with complaints by telephone, when we did not receive telephone calls and resolve them through a telephone call, we would have those complaints in writing. By the time they would come to us and we would begin to deal with them, the complainant would usually have moved on and they would be withdrawn. I think we are probably doing a much more effective job of actually responding to those complaints, although they do not show up in our jurisdictional statistics now.

Mr Bell: While we are on the Ministry of Correctional Services matter, in your opening statement at page 3 you describe that "complaints received by telephone are by their very nature 'nonjurisdictional.'" Is "nonjurisdictional" also known as premature because there is nothing in writing yet?

Ms Morrison: Yes, although quite often they will not turn up in writing anyway. The way we are dealing with them now, they are counted as a

contact and we are dealing with them over the phone, so they are never going to come back in writing. They are premature, but they are also in the end going to be nonjurisdictional because they are not going to come back.

Mr Bell: But for someone who may want to read your statistics and get some insights as to subject matter, when you categorize these telephone calls as nonjurisdictional, you are not saying the subject matter takes them out of the jurisdiction of the Ombudsman; you are just saying that by their very nature--nonwritten--the Ombudsman cannot investigate.

Ms Morrison: That is right.

Mr Bell: On page 23 of the materials, under the "complaint supported" category, under the "formal recommendation" subcategory, for this year you show that there were 19 22(3) recommendations accepted, presumably in the first instance by the governmental organization concerned, and that six were not.

Ms Morrison: That is correct.

Mr Bell: Just to complete the record, those six have now been accepted, because we do not have them here.

Ms Morrison: That is right.

Mrs Meslin: Except the one.

Ms Morrison: No.

Mr Bell: No, one is a special report.

Mrs Meslin: A special report; okay.

Mr Bell: So your batting average is, out of 25 22(3) recommendations, you got 25 acceptances ultimately.

Ms Morrison: That is correct, either acceptances or resolutions of some sort that were acceptable to us.

Mr Bell: Is that a trend or is that indicative of anything other than just the subject matter and the particular ministries with whom you were dealing?

Ms Morrison: In the past few years, I think we have had much more success in resolving recommendation-denied cases prior to coming to this committee. In fact, most of the cases that we have dealt with at the committee in the past couple of years have been special reports and not the reports that have gone through the process of the annual report. I believe that we have had very good success over the past two or three years in this area.

Mrs Meslin: I think a lot of it has to do with the fact that with our effort to take the initiative to introduce ourselves to ministers and deputies and to set up committees with them, we have developed a much more co-operative feeling between the agencies and ourselves and they have helped us to resolve some of those matters.

Mr Bell: Can I look at your flowchart, the last page of the material you handed out? At least I can get some further clarification of that. First

of all, can you indicate where, on this chart, the Ombudsman is involved? Can you point us to the various boxes where we could insert the letter O to indicate that the Ombudsman directly participates in that part of the process?

Ms Morrison: At the very top of the chart where you could come to the "appropriate team decision" box, the "special cases" arrow, and the "director" box, there quite often would be at that point a discussion between the director, other staff members and the Ombudsman about a special case—some case which is going to be either very sensitive or that needs special attention of some sort. So in that "special cases" category, you have Ombudsman's involvement.

Mr Bell: Can you just review the ones that are Ombudsman always, because that is the way your procedure is structured.

Ms Morrison: Okay. The case conference chain, not necessarily the preliminary case conference, but the first case conference always has the Ombudsman involved.

Mr Bell: I am looking almost halfway down the page and I see a rectangle saying "first case conference."

Ms Morrison: That is right.

Mr Bell: Would we put the Ombudsman there?

Ms Morrison: You certainly would.

Mr Bell: I understand you are saying not necessarily prior thereto.

Ms Morrison: Not necessarily, but sometimes.

Mr Bell: Where?

Ms Morrison: "Preliminary case conference," for example, might have the Ombudsman involved, or it might not.

Mr Bell: Okay.

Ms Morrison: That might just be a meeting about some legal issue which needs to be resolved.

Mr Bell: All right.

Ms Morrison: On the other side of that chart, the rectangle that says "AF/NSR," the nonsupport report has to be reviewed and approved by the Ombudsman. The Ombudsman signs nonsupport reports, so there is an O in that rectangle.

Mr Bell: Just to cover off that for a moment, in the diamond "research and investigation evaluation," there is a line that goes down to "AF/NSR" and it says "nonsupport."

Ms Morrison: That is right.

Mr Bell: I read that at first instance as somebody other than the Ombudsman making that decision. I think what you have just told us is that

somebody evaluates research and investigation and somebody makes a recommendation to the Ombudsman not to support it.

Ms Morrison: That is right.

Mr Bell: It is his ultimate decision, as evidenced by the letter.

Ms Morrison: By the nonsupport report, which is signed by the Ombudsman, right.

Mr Bell: So that every decision at that stage, or at any stage here, not to support a complaint is ultimately the Ombudsman's decision.

Ms Morrison: That is right.

Mr Bell: Okay.

Ms Morrison: So that will take you down, for example, to the rectangle which is just down to the right of that, which also says "AF/NSR" report.

Mr Bell: Write Ombudsman there?

Ms Morrison: There will be an Ombudsman decision there. Subsection 19(3), of course.

Mr Bell: All right.

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Ms Morrison: Now, representations are made to the Ombudsman often, not always directly but often directly.

A section 18 at this stage of the process would almost always be signed by the Ombudsman. In fact, I would think it would always be signed by the Ombudsman. The section 18 that we were talking about earlier, which is that there is another administrative remedy, just a referral section 18 would not necessarily be signed by the Ombudsman, but by the time you have gone through supporting a 19(3) and then a decision, section 18, that would be highly likely to be signed by the Ombudsman.

Again, when you see "AF/NSR" report following the representations of the ministry, that would be an Ombudsman decision.

At the second case conference, of course, the Ombudsman would be involved.

A section 22 report, of course, is signed by the Ombudsman. The Ombudsman sends the report to the Premier and the complainant at the end of the process.

Mr Bell: I think we could probably put a circle around everything including and under "ministry response" and say, "Ombudsman."

Ms Morrison: Yes.

Mr Bell: If I might just split back to the discussion we had this morning about subsection 4(2) of the regulations, I take it where you would

like to have an investigator be able to confer in some way with a complainant is up at the research and investigation evaluation stage, whether there is an initial decision to support or not to support.

Ms Morrison: That is right. And the AF stage.

Mr Bell: And perhaps after the first case conference, where again there is another decision either to not support or more investigation.

Ms Morrison: Yes, in that case as well.

Mr Philip: So on that chart, just as a supplementary, as of tomorrow, would you just point out to us on the chart where the Ombudsman would not be able to act?

Ms Morrison: Any of the places that Mr Bell has just noted where the Ombudsman is involved, there will be no decision or no one capable of taking that decision.

Mr Philip: That is what I thought your answer would be, but I just wanted to make sure. So even those decisions which are not in the affirmative will also be tied up?

Ms Morrison: That is right. A nonsupport decision is essentially just the opposite of a support decision. I think it is the Ombudsman's view that it is just as important a decision to a complainant and just as important a report under the act as a decision to support.

Mr Philip: But decisions also that a person should have other avenues open to him. On this chart, I am trying to remember where that comes in. Are those affected?

Ms Morrison: The early section 18s would not be affected, because most of those would be right at the intake area.

Mr Philip: Where somebody has said: "Go back then. There is one more step you have to go through."

Ms Morrison: Exactly.

Mr Philip: Are there some section 18s then that are affected, as affected down by your lower level?

Ms Morrison: Yes, the section 18s that are later in the process and where there is some serious decision taken as to reasons why we ought not to further investigate. Those are taken by the Ombudsman, those are not delegated decisions.

Mr Philip: Some of those decisions might be that there is another course of action open to the person and that he should go through that process first.

Ms Morrison: They might be, although we usually have discovered that earlier in the process. Most of those decisions, section 18, might be for example that the complainant wants X, the ministry has said, "We will do Y," and the Ombudsman thinks that Y is a pretty good answer to the complaint. The complainant may not necessarily think so, but the Ombudsman says, "Under these circumstances, I am not going to further investigate because I think this is a

good answer to your circumstance." That would be the kind of section 18 that is an Ombudsman decision.

Mr Philip: I had a couple of questions I wanted to tie in on the management group. If there are more questions on statistics, I do not want to block the trend.

The Vice-Chairman: Is there anyone else with any questions concerning the report?

Mr Philip: May I ask some questions stemming from page 6 then of your annual report where you talk about a smoking policy. I am wondering what the smoking policy is in the Ombudsman's office at the moment among your staff. What assistance, if any, are you providing to staff who may be hooked on drugs, this particular one being tobacco; and do you have an evaluation of the effectiveness of each of the programs, since there are an awful lot of snake oil salesmen out there in addition to legitimate programs that do work? No conflict of interest is intended.

Mrs Meslin: When we decided to adopt this policy, we did it in co-operation with our employee relations committee, because we felt, as you said, that it is not easy to develop a nonsmoking policy when you have smokers who have a problem with stopping. So we did it in a number of stages. We introduced a partial nonsmoking policy, that is, we had a smoking room in the basement where people who had to have a cigarette could do so. In addition to that, we set a date six months ahead, telling those people that the policy of complete nonsmoking in the building would be instituted, but that we would be willing to pay the fee of any completed quitting smoking program for anyone who had a problem and was hopeful of doing something about it.

As a matter of fact, we had a lot of excellent co-operation from everyone. Even the diehard smokers agreed that we should have a nonsmoking policy and made the attempt, through courses or what have you. When we instituted the full policy, we said to those people who still were addicted that they could, of course, smoke outside in their break if they had to, but that there would be a nonsmoking policy in the office. We have found that out of our complete staff of about 110 in the office, we probably have half a dozen people who still smoke, but they do not smoke in the office. They may go out for a cigarette a couple of times a day, but the staff of the office generally were co-operative and helpful and participated in the formulation of that policy.

Mr Philip: You paid, in their entirety did you say, for programs to help people stop smoking, or reimbursed them? That is the same thing as paid in their entirety.

Mrs Meslin: That is right.

Mr Philip: Do you have any figures on how many people actually stopped as a result of these programs?

Mrs Meslin: I could get them. We have them in the office, I just do not have them at hand.

Mr Philip: You talk also about a acquired immune deficiency syndrome education program. Is that simply among your staff or is that a general kind

of systemic education program to help the public service as a whole understand not to discriminate against people who are found in this situation?

Mrs Meslin: It is twofold. We began by feeling that the first step had to be an internal AIDS education policy, so we had day-long lectures for all the staff on two separate days by someone who was an expert and had done those things. We formulated a particular AIDS policy guideline.

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When I say it is twofold, I mean we did it internally and the external part had to do with a number of cases we were handling. That made us feel it was very important we have an AIDS policy that we believe other ministries and agencies should be looking to. We have had long discussions with various ministries that are looking at AIDS policies. As a matter of fact, the one we have developed has been commended and some of the ministries are looking at it in terms of adapting theirs to ours. So we have had a lot of work done on it internally and externally.

Mr Philip: Let me guess. I am willing to bet that the Ministry of Correctional Services is probably the first which is co-operating with you. Am I correct?

Mrs Meslin: As a matter of fact, Kathy Penfold, who is one of our investigators, has been our "AIDS expert" in the office because she instigated and assisted in developing all those policies.

Ms Penfold: My name is Kathy Penfold. I am an investigator with the Office of the Ombudsman.

Mr Philip: Am I correct in saying that it is probably the Ministry of Correctional Services which proved to be the most co-operative in trying to formulate a reasonable AIDS education program, or are there other ministries also involved? I am just guessing; they have not told me.

Ms Penfold: Actually, most of the work with the Ministry of Correctional Services under AIDS policy has come about through the Ontario Human Rights Commission, because the commission has declared that AIDS is a handicap under the Human Rights Code. So our involvement in the AIDS policy of the ministry is fairly limited except when there are complaints about how the policy is being implemented.

For example, inmates will call us and complain about being kept in segregation. Sometimes we can work with the ministry to sort those problems out at an early stage. If not, under most circumstances we have to refer the person over to the human rights commission, and it will investigate those complaints. We have provided a lot of information to the commission.

Mr Philip: I gather from what Mrs Meslin said that you have developed some criteria which have been made available to the ministries. I guess my question is: Which ministries are using it? Are there ministries that have refused to use it? Are there any trouble spots you can identify at the present time?

Mrs Meslin: Perhaps I misspoke. We have not developed an AIDS policy that we have distributed to ministries per se; what we have done is develop an AIDS policy, and when we get into discussions with ministries about it they

have asked to see it and have indicated to us that they would like to adapt their policy to ours.

Mr Philip: Have you taken the initiative of questioning each of the ministries to find out whether they do have an AIDS policy, and if so what is that policy?

Mrs Meslin: No, we would not do that, because we do not have any reason to do it. We do not have a complaint that would kick that off and we have not done a systemic or own-motion complaint on AIDS at this point.

Mr Philip: It just seems to me that that would be a reasonably easy process to initiate from a systemic point of view. It might avoid an awful lot of complaints and it would not be a terribly difficult process to undergo: to simply question each of the ministries, to share whatever information any of them may have developed with the other ones, as well as to develop and make some suggestions in terms of process that might work. It is not a terribly elaborate thing to do, but it might cut down on a lot of complaints.

Ms Penfold: Actually, Mr Philip, something very similar to what you have described is happening. Our office has participated in an interministerial committee on AIDS, I believe that committee is set up by the Ministry of Health. It had been meeting approximately every two months, and the purpose of it was for different ministries to bring in their policies, to discuss them among themselves, to share the information and hopefully to cut down on reinventing the wheel. Also, each of the ministries acted as a bit of a policing agent, because we would read the policies and comment on them.

Our involvement was a little less formal than the other ministries', just because we have a bit of a problem, I guess, in being part of the process to build the policies that we might turn around and investigate next month, but our policy was shared. At those meetings we receive a lot of positive feedback, because I think we were the second government agency or ministry or office to have developed a policy.

Mr Philip: It seems to me, though, that there is a difference between building a policy and auditing to find out whether or not there is a policy. I think you do have a role to ensure that there is a policy, to find out whether there is a policy so that when the complaints do come, if they come at all, they are handled appropriately and there is something in place.

My last question is this: Much stress has been laid and indeed advances made under the past ombudsmen in terms of systemic work. I am wondering, while you mention it briefly in your annual report, are there any areas presently under study from a systemic point of view? Do you see any areas where you feel that some kind of systemic study is necessary?

Mrs Meslin: At the present time, we are not doing any systemic investigations. It is an area that I hope to be able to recommend to the new Ombudsman, that time be spent on examining more systemic issues, but we are not doing any at the present time, although we have a number of suggestions within the staff for possible systemic investigations.

Mr Philip: Let me leave you with one last idea. As the Provincial Auditor is also interested and has been doing I think just an excellent job of doing some systemic analyses, it seems to me that often there are ways in which both the Ombudsman, who is the protector of human rights, if you want, and the auditor, who is the protector of the taxpayer, have an overlapping

interest in looking at a system, because often systems that are inefficient are also inhuman. If you have an inefficient system, that is usually where people fall between the cracks and so forth.

I will leave this with you, and I do not expect you to answer it. I would hope that there might be some way in which the Ombudsman of Ontario and the Provincial Auditor, both of whom I have great respect for and I think are probably at the forefront in this country in terms of their offices, might try to start working together and touching base when it comes to doing systemic analysis. I can think of perhaps one area where the auditor, right now, is looking in some depth at efficiency but where individual human rights are concerned.

I understand that he is looking at efficiencies—or inefficiencies, I should say perhaps—in the rent review process. The inefficiencies may well be injustices to both the landlord and the tenant in terms of the delays in the bureaucracy and so forth. It is in areas like that where perhaps both ombudsmen, the Ombudsman of the taxpayer and the Ombudsman of ordinary citizens, might work together in joint studies in ensuring that we develop the most efficient systems possible that are also the most responsive. I leave that with you for future consideration.

Mr Pollock: I see that you have 10 offices of the Ombudsman scattered throughout the province. I take it there must be a criterion in mileage to locate those offices; it certainly would not be on population, because six of them are in northern Ontario and only four in southern Ontario. Is that right?

Mrs Meslin: Dr Hill, during his tenure, paid particular attention to the problems of the north, as I think you know, so when he looked to the establishment of additional regional offices, his interest first was in the north and then, once they were established, he also realized that he certainly had to extend it to the west, London and Windsor, and was looking to, I think, Kingston in the east, because he had Ottawa, but had not gotten to that point. He had put in Sudbury as his last office.

Mr Pollock: But there is no set criterion in mileage, say 200 miles, that you have to have an office every 200 miles or whatever?

Mrs Meslin: No.

Mr Pollock: None at all. Okay.

The Chairman: Are there any other further questions from the committee on the statistics? I just wanted to make a comment following on what Mr Bell has said, that really relatively few—you do balance between the government operating its business efficiently, effectively or fairly and looking after the complainant, because really a small number of your cases do go to a recommendation, to the point where they are denied or accepted. I think all too often we see just the ones that are denied. It just brings to light again today that a number of them are resolved or not substantiated. I think it is good that they have all been resolved to some kind of resolution, of the ones you did have this year.

Just on new business, I have been informed by the Ministry of Agriculture and Food that it is not prepared to come before the committee in this session regarding Farm Q. They will be giving us reasons in writing, and I gather it had to do with the amount of time they have had to prepare the

case. I would not want to shortchange their arguments as to the need for a few more weeks, but they wanted to update their genealogical or hereditary or some kind of study, their data. They will be giving us something in writing before next Monday afternoon, so we will be able to share that with the committee. I understand they will be ready in about six to eight weeks. As I say, they will be providing us with something in writing. I think I have been unfair to synopsize their discussion with me in such a short time.

The other is that tomorrow we will be dealing with our expanded jurisdiction in camera, and perhaps get some kind of report written as a result of the hearings we had one year ago.

In addition to that, the clerk will be providing us with a new agenda, but next Tuesday, since Farm Q will not be in attendance before the committee as your agenda showed, I would say that we will probably be writing our report in response to the Ombudsman's annual report on the Tuesday. I would expect, all being well, we probably will not be meeting next Wednesday the 27th; that we have completed our discussions on the Tuesday.

So we will be meeting on Monday with Ms W and the Ministry of Health, and on Tuesday drafting our annual report. I would suggest that we probably will not need Wednesday or Thursday of next week. Unless something new develops, I would suggest that is the way it will be going.

Anything before we adjourn today and resume again tomorrow at 10 o'clock. Seeing no comments, thank you very much, and we will see you on Thursday. The meeting is adjourned.

The committee adjourned at 1534.

STANDING COMMITTEE ON THE OMBUDSMAN

ORGANIZATION
ANNUAL REPORT, OMBUDSMAN, 1988-89
RECOMMENDATIONS DENIED

THURSDAY 21 SEPTEMBER 1989

STANDING COMMITTEE ON THE OMBUDSMAN

CHAIRMAN: Nicholas, Cindy (Scarborough Centre L)

VICE-CHAIRMAN: Bossy, Maurice L. (Chatham-Kent L)
Bryden, Marion (Beaches-Woodbine NDP)
Carrothers, Douglas A. (Oakville South L)
Cousens, W. Donald (Markham PC)
Henderson, D. James (Etobicoke-Humber L)
LeBourdais, Linda (Etobicoke West L)
Lupusella, Tony (Dovercourt L)
MacDonald, Keith (Prince Edward-Lennox L)
Philip, Ed (Etobicoke-Rexdale NDP)
Pollock, Jim (Hastings-Peterborough PC)

Substitutions:
McLean, Allan K. (Simcoe East PC) for Mr Cousens
Smith, E. Joan (London South L) for Mr MacDonald

Clerk: Carrozza, Franco

Staff:
Evans, Catherine A., Research Officer, Legislative Research Service
Bell, John, Legal Counsel; with Shibley, Righton and McCutcheon

Witnesses:

From the Ministry of Labour:
Ellis, Ron, Chairman, Workers' Compensation Appeals Tribunal

From the Office of the Ombudsman:
Meslin, Eleanor, Temporary Ombudsman
Keil, Martha, Assistant Director, Investigations
May, Laurel, Investigator

LEGISLATIVE ASSEMBLY OF ONTARIO

STANDING COMMITTEE ON THE OMBUDSMAN

Thursday 21 September 1989

The committee met at 1016 in committee room 2.

ORGANIZATION

The Chairman: Can I call the committee to order? Sorry for the late start, but there was a bit of confusion this morning. It was a little unusual, the concern we had this morning, but not a new one.

I just want to bring to the attention of the committee a letter we received from Carl Dombek, the solicitor or legal counsel to the Ministry of Agriculture and Food. As you will recall, on Tuesday afternoon I indicated to you that he had notified me by phone that he was not prepared, due to a number of circumstances, to respond to the Ombudsman's case with regard to damages in the Farm Q case. He has provided us in writing now the reasons for his decision. Should I read it into the record? I think it would be appropriate, given the sensitivity of the case, that I read his reasons into the record.

"Dear Ms Nicholas:

"Re: Farm Q

"On behalf of the Ministry of Agriculture and Food I would like to request that the Farm Q matter be scheduled in order that we may properly assist the committee in its deliberations. As we only received a draft copy of the Ombudsman's report late in the day of 14 September 1989, ministry officials feel that some time is needed to properly evaluate the report. Furthermore, it would be very useful to the committee if Dr Kennedy could update his research into the Farm Q situation. Finally, as you are aware the Premier recently appointed a new Minister of Agriculture and Food and it would be appropriate to brief him thoroughly on the issue and to obtain his views.

"I would hope that the ministry would be in a position to proceed in about 6-8 weeks. I hope this is satisfactory and that it does not inconvenience the committee greatly."

It is signed by Carl. In discussions with the Ombudsman, myself, counsel and Carl, we left open the option that they may not want to proceed because of the circumstances, and this is the response he has given.

Mr McLean: It refers to Dr Kennedy in the letter. Who is Dr Kennedy?

The Chairman: Dr Kennedy was—I would say something different if I was not on the record—that very charming man who sat to the left of Mr Dombek. He was the scientist and is doing the study, I gather, on the first generation of the pigs and their fat content.

Mr Carrothers: A geneticist, I think, from the University of Guelph.

The Chairman: From the University of Guelph, was it not?

Mr McLean: Was it he who was requesting the extension or was it because of the minister?

The Chairman: I think it was the ministry's response to the damages that were outlined by the Ombudsman and, combined with that, just the opportunity to update some of its recent calculations on Farm Q. We had never addressed anything on damages.

Mr Philip: Mrs Smith, do you have a substitution notice from the whip?

Mrs E. J. Smith: Yes, I was substituted, as a matter of interest, a week and a half ago—

Mr Philip: I am only kidding.

1020

I think it is a reasonable request. I would suggest, though, since it is such a complicated case, that it be scheduled for the Christmas recess. I do not see us dealing with Farm Q for two hours a week for Lord only knows how many weeks. Let's deal with it in a block some time during the Christmas recess.

The Chairman: I respect your opinion. I feel similar and I know a number of the people on the committee do as well. We will certainly inform Farm Q that it is more likely it will be heard during the months of January and/or February. Respecting that you are the critic and will not be here in February, it would be preferable in January, so they will notified of that.

Are there any other matters with the committee at this stage? Seeing none.

## ANNUAL REPORT, OMBUDSMAN, 1988-89
## RECOMMENDATIONS DENIED

The Chairman: We have before us today the Workers' Compensation Appeals Tribunal matter. We have Ron Ellis, who is chairperson, is it?

Mr Ellis: The statute says chairman.

The Chairman: Am I chairman? I am a chairman too. How about that?

Ms Bryden: Why not use chair?

## WORKERS' COMPENSATION APPEALS TRIBUNAL

The Chairman: If you want to join Mrs Meslin at the table, it would probably be more appropriate at this point. Since this is a somewhat complicated matter that none of us has really delved into before, other than in our personal constituencies, I think it might be good if Mr Bell outlined a little bit and then, Eleanor, if you wanted to say a few words, there would be the opportunity.

Mr Bell: In your briefing material it will probably assist you if you turn to the Ombudsman's annual report at page 26. That page starts a detailed summary of this particular matter. You are not going to be asked to consider or deliberate upon the facts or the evidence of this case. It is a purely procedural—well, it is more than procedural, but it has some significant procedural elements to it. I will try to put the issue simply, if I may. It is timely that it is put, because I believe this is the first

so-called recommendation-denied case that has been submitted to the new Workers' Compensation Appeals Tribunal and it is therefore the first time that the tribunal has responded.

The real issue seems to be, when the Ombudsman recommends to the tribunal that it reconsider one of its decisions, whether the tribunal should take that recommendation and automatically or without further and additional consideration initiate and reconsider the issue, or whether, pursuant to its own procedures, the tribunal can or should consider the recommendation of the rehearing in the manner that it considers it necessary to do. It has to do a bit with a consideration of what the status of an Ombudsman recommendation is to this tribunal for reconsideration, relative to anybody else's request for reconsideration.

I would like to be a little more deliberate this morning because we are into new territory. Those of you who have served on the committee in years past are familiar with the manner in which the Ombudsman investigated Workers' Compensation Board decisions and the fairly wide spectrum of recommendations that have been made. That has been changed, obviously because of the change in legislation and the change in the tribunal, etc. With that, Mrs Meslin and whomever you are assisted by, can you explain to the committee what your concern is?

Mrs Meslin: Thank you. I have asked Martha Keil, who is the assistant director of labour and psychiatric services and who has been with the organization for a number of years doing workers' compensation cases, to outline for the committee our position.

Ms Keil: Good morning. It is nice to be back. I have not been here for a while, so you will have to excuse me; I am a little nervous.

We are here this morning to discuss the way in which the Workers' Compensation Appeals Tribunal has responded to the recommendations of the Ombudsman. As Mr Bell has outlined, the tribunal has the power to reconsider when it finds it advisable to do so.

In its response to our office, the tribunal has taken the position that an Ombudsman recommendation to reconsider should be treated no differently than a request by a worker or employer to have his case reconsidered. Thus, if I understand the tribunal decision correctly, it says that the Ombudsman has the same status as a party with a vested interest in the outcome of its decision. We do not think this is right, and the reason we do not think it is right is that it demonstrates, I think, a profound misunderstanding of the role and function of the Ontario Ombudsman and what it was intended to do.

The Legislature established our office and established this committee to ensure that anyone who feels aggrieved by a government decision has recourse to the Ombudsman for the purpose of a fair and objective investigation and a fair and objective evaluation of the complaint. A cornerstone of this mandate is that impartiality and objectivity are extended not only to those who have complaints but to those who are complained about. Thus, to say that we belong to the group of people who are complaining is not in line with how we work.

I would submit that a more reasonable test for reconsideration, and how to treat the Ombudsman's recommendation, could be found in the first and leading decision on reconsideration, with Mr Ellis as chair of that panel, when he stated the case for granting a reconsideration as follows:

"A reasonable test might be to ask: Are the grounds sufficiently compelling that an objective observer familiar with the case would have no difficulty in recognizing that if the case were reconsidered on those grounds there would be a high probability that a different result would follow?"

It seems to me that this language for reconsideration suits itself ideally to the Ombudsman, the impartial observer. As far as being familiar with the case goes, I think our history with respect to workers' compensation is a long one and well known to this committee. I have no hesitation in claiming for those of us who work in the area great breadth and depth of information, not only for a specific case but in applicable law, comparable other tribunal decisions and relevant workers' compensation policy considerations. Thus, I think it is appropriate when trying to mesh, if you will, the mandate of the tribunal and the mandate of the Ombudsman, to consider what each of us so ably does.

1030

Before going on to more detail, I would like to touch on what I take to be a very legitimate concern of the tribunal, that it must and needs to follow its own legislation and mandate. This is quite true, and we have quite sincerely--although it is not very good for an argument--great respect for the functioning of the tribunal. However, I think it is really essential to point this out, that an agreement by the tribunal to reconsider when an Ombudsman so recommends does not in any way tie the tribunal to coming to a particular decision.

In fact, as a matter of our procedure, when we get a letter of complaint from a worker or an employer concerning a tribunal decision, the first thing we tell him in the standard letter that goes out to anybody is that even if the Ombudsman were to find a case against the tribunal to be supportable, the only recommendation the Ombudsman thinks is appropriate to make is that the tribunal reconsider. We go on to tell them this means that the tribunal will hold a full hearing, that both parties will be making submissions and that the tribunal will be deciding the case on the merits. I think this shows that we have great respect for the functioning of the tribunal. What we are here today to request, in our view, is the same respect for our process that we have demonstrated for the tribunal's.

Mr Bell: Martha, can we try to get a little more detail out? It is necessary for the committee on a comparative basis, I think, to understand what is new. With the previous legislation the Ombudsman made recommendations pursuant to subsection 22(3) really to suit the circumstances of a particular complaint and the results of investigation. Is that correct?

Ms Keil: Right.

Mr Bell: That could be anything from, "Go pay for a heat lamp," to "Increase temporary total disability benefits to whatever."

Ms Keil: That is right.

Mr Bell: A decision has been made by the Ombudsman now, though, to limit the recommendation to one only, and that is to the tribunal to reconsider.

Ms Keil: That is right.

Mr Bell: Why?

Ms Keil: I am sorry to go back into ancient history, but when we used to deal with appeal board decisions there was many years ago a case wherein we recommended to the appeal board that it reconsider with a view to, and it did not. When it came to the then select committee, the committee told us that in future we should tell the appeal board what it was we wanted it to do. So we changed the nature of our recommendations to say, "You should do this specifically," "You should pay this worker," "You should give this benefit," "You should provide this heat lamp."

The position of the office with respect to the tribunal and in consultation with our legal counsel was that it was inappropriate to ask or recommend that a quasi-judicial tribunal go in a certain direction, because if we told the tribunal that, in our view, the Ombudsman thought it should reconsider with a view to granting, that would be to fetter the tribunal's discretion and would be to ask the tribunal to go against its own mandate, which is to have a full and open hearing. If we tell the tribunal what we think the outcome should be, that would be to ask it to do something it cannot do. We respect that. Irrespective of whether we might think the decision is wrong, it seems responsible for an Ombudsman to make a recommendation with which a government agency can reasonably and legislatively comply.

Mr Bell: All right. I would like to take that, and then let's look for a moment at the legislation. Members of the committee, I believe the clerk has distributed to you the amended sections of the act, section 86a and following, which set out the provisions referable to the new tribunal. What we did not give you, and I apologize, is section 76 of the act. It is very brief. Just let me read it for you, because it is an important part of this exercise. That sets forth that, "The board may, at any time if it considers it advisable to do so, reconsider any decision, order"—etc—"made by it and vary, amend, revoke," etc. That is still the section that gives the tribunal the discretion and the authority to reconsider "if it considers it advisable to do so."

I think you and I can agree that what that section requires the tribunal to do is to exercise discretion as to whether or not it is going to reconsider.

Ms Keil: Yes.

Mr Bell: I think for full understanding, if we paint the full road, if you will, of a process of reconsideration which results in a change of a decision, the tribunal or some panel of the tribunal first decides whether or not to reconsider, and if it decides so to do, then there is a process or rehearing referable to that reconsideration.

Do I put the Ombudsman's position fairly when I say that when the Ombudsman now makes a recommendation to the tribunal that a particular decision be reconsidered, what the Ombudsman wants the tribunal now to do is to hold a hearing reconsidering its decision, without giving further consideration to the issue of reconsideration. Forgive that language, but I cannot think of a better way of putting it.

Ms Keil: Not exactly.

Mr Bell: All right. Will you explain to the committee what you expect the tribunal to do in response to a recommendation to reconsider?

Ms Keil: Can I just backtrack a bit for clarity?

Mr Bell: Yes.

Ms Keil: The tribunal has what it calls a threshold test for considering it advisable to reconsider. There are certain standards the facts have to meet in order for the tribunal to decide it to be advisable. When the Ombudsman sends out his or her final report, the report deals with the question of the threshold issue and states why in the Ombudsman's opinion the report meets that and then says, "Yes, we would like you to reconsider."

I guess the only point I am a little hesitant about is the suggestion that we want to pre-empt the advisability issue. In fact, the report very specifically goes to the advisability issue, outlines why it is advisable and then recommends reconsideration. I do not want to belabour that, but I think it is an important distinction because we do not show disrespect for the tribunal process by not addressing our minds to it in our final report.

Mr Bell: Then I guess the way I should have put it is that you believe any report issued by the Ombudsman that contains a reconsider recommendation itself should meet the threshold question or the threshold test--

Ms Keil: Oh, yes,

Mr Bell: --and that you expect the tribunal should accept that report as meeting the threshold test without further consideration.

Ms Keil: We would hope that upon a reading of the report, yes.

Mr Bell: No, the words are important here because you are asking a tribunal which you have said is a quasi-judicial one with statutory powers to do something and it is very important we understand what it is you are asking it to do. Am I stating it fairly when I say that because you believe the Ombudsman's report meets the threshold test for reconsideration, you want the tribunal to accept the report without any further consideration?

Ms Keil: Yes.

Mr Bell: Can you assist me? I will throw out a rhetorical question. Is that not a bit like fettering the discretion of the tribunal?

Ms Keil: Hypothetically, it could be. I do not think it is.

1040

Mr Bell: Never mind hypothetically. Well, if it is hypothetically, why is it not really then?

Ms Keil: I am thinking.

Mr Bell: By the way, you do not have to be so nervous.

Madam Chairman: Yes, Martha, the same group.

Mr Bell: We are all friends here. We share cookies.

Ms Keil: It is because I do not have a case and I am not comfortable without a sort of concrete worker.

Mr Bell: By the way, if there is anybody you want to confer with, please do so.

Ms Keil: I am just doing that.

I just thought of it. The reason we do not think that fetters the discretion is because the final report only comes after the subsection 19(3) letter, which sets out at that point in the investigation all the reasons we think something should be done, gives our tentative recommendation and asks them to consider whether it is advisable, asks them to think about it before they get back to us, and the final report then makes a conclusion. A final conclusion only comes after that initial stage of the process. I do not see how when you invoke the 19(3) stage you can be said to be fettering the discretion.

Mr Bell: You do not ask them in the 19(3) to reconsider, do you?

Ms Keil: Yes. We say, "The possible conclusion and the possible recommendation would be...."

Mr Bell: Is that asking them to reconsider? That is just saying: "This is where we are as of now. This is where I think I may go. What's your comment? What's your input?" You have not made any final determination of the issues, I hope.

Ms Keil: No.

Mr Bell: Can you help me with this. It may not be an analogy and if it is not, please shoot it down as such. How is what you are asking the tribunal to do any different from coming to this committee and saying: "Here is my report. Automatically recommend it to the House. I have met the tests. I have met the provisions of the Ombudsman Act. I have done my investigation. Do not consider it, committee. Just pass it on as a recommendation for adoption." How is it any different?

Ms Keil: The reconsideration process we are asking the tribunal to go through involves looking at the merits and deciding that in the reconsideration process. I do not think it is quite the same.

Mr Lupusella: Can I interject on this particular point because it is very crucial. Under the old act, a reconsideration was granted by the Workers' Compensation Board if new evidence was presented before the board, and after a complete review of the new evidence the board would decide whether any consideration of an appeal was possibly granted or not.

What is the basis of reconsideration of a decision from an independent appeal tribunal you are asking for, based on which policy? Under the old act, the board had the power to reconsider a case based on new evidence. It was a matter of policy. The board had the power. The policy was, "If you are able to present new evidence on the case, I will grant you reconsideration." On this particular issue, what is the basis of reconsideration?

Ms Keil: Do you mean an Ombudsman recommendation?

Mr Lupusella: Yes.

Ms Keil: It might be on an error. According to our legislation, we might make the recommendation on an error of fact or law. We might make a

recommendation on the basis that we thought it was wrong.

Mr Lupusella: Are you not afraid that if the Ombudsman's recommendation were to carry in this particular instance, a precedent would be set under the statute of the independent appeal tribunal and the employer will come out and say, "I need reconsideration of the case as well." What will happen, the old system of WCB or the new system?

Ms Keil: No, I do not think so. I would like to put that in perspective for you. We have been investigating tribunal cases for over three years. I do not have the exact figures, but since I see them all at various stages I can safely say that they are into the hundreds. Out of all of those cases where either the employer or the worker has asked us to say that the tribunal decision was not right, we have only done that to date in two cases. So in roughly 198 cases, we have written back to the complainant and said that a fair and impartial investigation by our office has said that the tribunal exercised its mandate as a quasi-judicial body totally appropriately and we cannot say anything other than that.

Mr Lupusella: When you open the door, I think the number of cases that are going to request a reconsideration is going to increase enormously.

Mrs E. J. Smith: What happened in the two cases?

Ms Keil: In the first case, the tribunal's decision, which is 95R, was to not reconsider. In the second case, the process is still outstanding.

The Chairman: Can we finish this with Mr Bell, then hear Mr Ellis and then open up for questioning?

Mr Lupusella: Sorry, Mr Bell.

The Chairman: I know there was some clarification there. I felt the same.

Ms Keil: As a clarification, could I just say that when we ask the tribunal to reconsider, we are not trying to fetter its discretion because we leave the decision it comes to when it reconsiders totally up to the tribunal. In fact, although I am not talking about specific cases, our response to the one case where the process is completed demonstrates our respect for the tribunal's right to reconsider or to consider the merits on its own without our saying, "You should have thought this way." When the tribunal advanced reasons for maintaining the decision, we accepted that.

Mr Bell: The clerk distributed to members of the committee yesterday an anonymized version of the reconsideration we are talking about. It would be helpful if you could turn to that. I just want to finish off this round with an understanding of the process as far as the Ombudsman goes. I just want to fill out the process. When the Ombudsman issued the report with the recommendation, the tribunal responded by scheduling a reconsideration hearing. Is that a proper description of it?

Ms Keil: Not quite.

Mr Bell: What is it then?

1050

Ms Keil: The tribunal put it to us after the first report that there were two questions the tribunal felt it basically had to answer. One was, should Ombudsman recommendations be treated in a certain way? The first hearing was convened solely to decide that point.

It goes sort of like this, I think, and Mr Ellis can correct me if I am wrong. The first hearing was to decide if Ombudsman recommendations should be reconsidered because the Ombudsman asks. The decision separately and distinctly given in an oral decision at the time of that hearing was, "No, an Ombudsman's recommendation should not be treated differently."

Then there was a second hearing that said, "Okay, we are not going to treat it any differently, but we are going to now look at it as a reconsideration request as if it came from a party and we are going to subject it to the threshold questions." To be fair to the tribunal and in order to be efficient with time, it also heard the merits of the reconsideration in case it decided to give reconsideration. So in fact, there was one first hearing and then there was a second hearing that did two hearings at the same time.

Mr Bell: What is it we have here?

Ms Keil: It is true. You have a decision that relates to both decisions.

Mr Bell: Even though it says it was heard on one day.

Ms Keil: Yes. I do not want to give the impression that this is misleading. It said in the body of the document that it was going to give written reasons for the oral decision it issued at an earlier date.

Mr Bell: Okay. It is confusing because in this decision there is reference to the attendance of persons from the Office of the Ombudsman, and they are described as observers. I am looking at page 2, the first paragraph under the heading "Hearings."

Mr Ellis: What happened, if I could just correct Ms Keil briefly, was that it all happened on one day. The panel gave an oral decision on the first threshold question and then went on. This contains reasons for that oral decision, as well as reasons for the tribunal's conclusions on the other question.

Mr Bell: I think this question should still be put to the Ombudsman's people, though. Were you present at this hearing?

Ms Keil: No.

Mr Bell: Who was? Okay, we have a live one.

Ms Keil: Laurel May was the investigator on the case.

Mr Bell: After the initial question was decided by the tribunal, ie, whether to treat a recommendation of the Ombudsman for reconsideration differently from others, were you still invited to participate in the second stage of this?

Ms May: Those of us who attended from the office did not participate

in any way. We came as observers. The hearings are public. Anyone could have gone to observe.

Mr Bell: My real question is whether or not you were ever invited or whether it was indicated to you that you could participate in the reconsideration part of the hearing.

Ms Keil: Yes.

Ms May: Before the hearing was held, before a date was established, the tribunal office was in touch with us to ask if we would be representing the worker. We responded that we would not be representing the worker because we did not believe that was our role.

Mr Bell: But after that, was it your understanding that you still had an opportunity to participate if you were so advised?

Ms Keil: No.

Ms May: I may be wrong, but I believe the invitation to participate was to provide the tribunal with our views on how it should respond to our recommendations.

Mr Bell: And that is the first part.

Ms May: That is the first question.

Mr Bell: I guess maybe I can ask Mr Ellis later whether there is any issue of standing to be given to the Office of the Ombudsman on these matters. Is there anything further you would like to add to assist the committee as to an explanation for the concerns you have?

I have a question. Forgive it, but so what? They do it this way; so what? How does it impact your office?

Ms Keil: I have two answers to that. One is a question of time. If the Ombudsman and staff go through what is usually a fairly lengthy and exhaustive investigation for an analysis and evaluation of the facts, come up with the answer that seems fair and reasonable and with reasons for that, and say to the tribunal, "We think you should do this," and the tribunal says—this is my view of it—"No, we're going to take it all back down to its component parts and think about it all over again and then we're going to decide," in my view that is a duplication of work.

I think there is a vast difference for a worker who gets a decision, let's say, that says, "No, you don't have any entitlement to benefits," and the worker, quite understandably, says, "I don't like that decision; I want benefits," and writes back in, as Mr Lupusella suggests, for reconsideration saying, "You should have given me benefits." That is quite understandable. He has a vested interest in wanting benefits.

When the case comes to our office and the worker says to us, "I want benefits," we do not say: "That's very nice. We'll go off and ask the tribunal for reconsideration because you want benefits." We go all through the process and evaluation very carefully with a very fine regard for the tribunal's own mandate.

We have said in many of our reports that we will not second-guess the

tribunal on evidence it heard, because we were not there. We will not substitute our opinion for that of the tribunal because we might prefer a different result. Reasonable people can disagree on the facts, it is true, and we ascribe to the tribunal the importance that the public hearing it holds has. But if we find an error of fact or we find that by its own logic it should go in a certain direction and we say, "We think you should reconsider and decide again, rehear and decide again," I do not think that fetters the tribunal's discretion and I do not think that kind of process and recommendation should be treated the same as a submission from a party. I do not think that is appropriate.

I just want to stress that the recommendation to reconsider leaves it completely open to the tribunal to decide the hearing as it wants. All it does, outside of showing some respect for the process that we have so painstakingly gone through, is ensure that less time will elapse before the worker or employer gets the hearing and gets a decision.

Mr Bell: To summarize before I shut up, it is to avoid duplication--time saving--and respect for the office and the process of the Office of the Ombudsman. Are they the two essential "so whats"?

Ms Keil: Yes, those are the essential "so whats."

The Chairman: What I would like to suggest to the committee is to give Mr Ellis an opportunity to respond and then questions will ensue. This is not like a typical case that we have before us. Without hearing his arguments for the opposite, pursuing this line of questioning may not be as fruitful. Is the committee opposed to that? Seeing nobody jumping up and down, perhaps you have a few words, Mr Ellis, before we commence our questioning.

Mr Ellis: May I say, first of all, that I appreciate very much being invited to participate in these proceedings. I should say, off the top as well, that there is in fact no substantive question about respect for the Ombudsman. Personally, in my tribunal, I have the utmost respect for the Ombudsman's work, particularly in the workers' compensation field. I think we all recognize that their role in the development of reform proposals in years gone by has been central and their work in reviewing our decisions has continued to display absolute first-class competence, if I can say that, with respect.

What we have here is a question of two mandates coming together. The Ombudsman has a view of how that plays out and the tribunal has a different view. Our view has two bases. One is that it is our opinion that under the legal direction we have been given, we have no option on this issue. Second, we believe as well that there are reasons of policy and substance that support the position the tribunal has taken.

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Of course, what we are talking about here is that in any exercise of our reconsideration power, we all acknowledge that we have two decisions to make as a tribunal. The first one is whether or not to reopen the decision and embark on a reconsideration. That is an important decision because it is a decision on whether to put in jeopardy one more time whatever benefit the worker or employer may have received from our decision on the merits which we are being asked to reconsider. The first question is not a technical or insubstantial question at all. It is a question of first importance: whether we will reopen the decision and put those benefits in jeopardy one more time and embark on a reconsideration of the whole matter.

It is only once we get past that first question and conclude that it is advisable, under the terms of the statute, to reopen the decision and embark on that reconsideration that we proceed then to hear the thing again and consider whether it should be changed in light of the new information or the new submissions or whatever. As Ms Keil has indicated, the Ombudsman has acknowledged that the second decision must be left to us. Because it is a quasi-judicial tribunal, our mandate is to make that decision.

I would argue, with respect, that the same analysis applies with equal weight and relevancy to the first decision, that that is a decision which also must be made by a tripartite panel of the appeals tribunal and it is not a decision that the tribunal is free to delegate to the Ombudsman.

There is, if you will forgive me for mentioning it, an actual Divisional Court decision, unreported, but in a Workers' Compensation Board matter, which seems to confirm that view of the nature of our obligation concerning that first decision. It is described in the appeals tribunal's decision number 215 at pages 109 and 110. With your permission, it would not take me a moment just to trace that decision.

Mr Bell: Can you give us the citation?

Mr Ellis: Yes, it is an unreported Divisional Court decision but it is in volume 4 of the WCAT Reporter, page 105, at page 109.

The Chairman: Will you provide us with copies after, as well?

Mr Ellis: Yes. This was a case involving a section 15 application—that is to say, an application by a defendant in a personal injury civil action in the courts—to have the tribunal say that the civil action against the defendant in the courts was barred by the fact that it was a workers' compensation case and came under the Workers' Compensation Board. It was a matter that had been dealt with originally by the WCB appeals branch, our predecessor organization. In the beginning of this decision, we describe the prior proceedings that brought it to the appeals tribunal's door and there is just a list of events.

First of all, the appeal board issued a decision ruling that the right of action was taken away. That was in January 1984. Then on 10 August 1984 the same appeal board reconvened a new hearing to reconsider that decision. It ruled that the right of action was not taken away.

The defendants in that case thereupon commenced an application for judicial review, arguing that they were not given an opportunity to make submissions regarding the need for a reconsideration of the original decision in the section 15 application. That is to say, the board did not go to the parties and say: "We're about to consider reopening this decision of ours and possibly making another one. Will you give us some submissions as to whether you think we should reopen the original decision or not?" The appeal board did not give that opportunity. The defendants made a judicial review application to the Divisional Court complaining about that.

In June of 1985 a judicial review application was argued in the Divisional Court. The Divisional Court ruled that the board erred procedurally in failing to permit all participants to make submissions regarding the need for the second appeal board hearing on the section 15 application. The court set aside the ruling of the appeal board. Then in September the appeal board convened to hear submissions regarding the need for a second hearing into its

original decision. The appeal board then granted the right to convene the second hearing. That is it say, it decided that the decision ought to be reopened, and at that stage it referred it to us, because the appeal board was just about to go out of existence and we had just come into existence.

So that was an instance where the Divisional Court interfered with the appeal board when it failed to regard that first decision, about reopening a decision that had already been made, as one of substance that required adherence to the rules of natural justice and so on, in the same way that a decision on the merits would have required. So on the legal question, in my submission, the Ombudsman's position, in which basically he is saying that because he is recommending that we reopen the decision we should therefore, for that reason alone, reopen the decision and embark on the reconsideration, in my submission the Divisional Court decision, on a reasonable interpretation of the section, would prevent us from doing that, would require us still to give both parties to the matter notice that the possibility of reopening the decision is being considered and an opportunity provided to address the question of whether or not it should be reopened. That is the legal position. We think we simply cannot, on a reasonable view of the law, comply with the Ombudsman's views on this point.

In terms of why we also think it is good policy that this law be as it is, the criteria for when to reopen a decision are a very important matter for the tribunal's overall process. It is important that decisions be regarded as final. As Mr Lupusella points out, this is not a one-sided operation. The Ombudsman's intervention can be triggered by either a worker's complaint or an employer's complaint. I think it helps sometimes to take the sympathy element out of it, to consider it the other way around, that you have a case where the employer has applied to have it reconsidered. That would be a case where the worker has finally got a decision awarding him benefits. It is very important that this decision not be disturbed except for really substantial reasons.

We think the appeals tribunal, with its tripartite structure and its specialization in compensation matters, is best positioned to develop those criteria and that the effect of the Ombudsman's position, if it were upheld, would be to hand over to the Ombudsman the ability to establish those criteria.

It is not just a technical matter. In the Mr T case, the one you have before you, in which we have made the decision in response to the Ombudsman's recommendation, that was a case where the worker had asked us to reconsider in the first place. The tribunal had decided there were no grounds that met our criteria for reconsidering.

The Ombudsman thought differently on that issue and thought it was a case we ought to reconsider. The tribunal panel which was established to deal with the case confirmed the original view that it did not meet the criteria for reopening a decision because there was no new evidence involved, it was an issue that had been argued in the first hearing and it was simply an opinion that a different argument was better than the one the panel had accepted.

The tribunal panel concluded that this was not the kind of thing that the tribunal ought to be reopening decisions on, so it is not simply a technical matter. On the point that Ms Keil makes, though, that we ought not to see the Ombudsman's recommendation here as just anybody's recommendation, I think our response to that is that it addresses the weight that ought to be given in our determination of that question as to whether to reopen or not, and I would expect, as I have said, given the obvious general competence of the Ombudsman's investigation activities and its reports and so on, it will

likely be a rare case in which, presented with such a recommendation, a tribunal panel would not think, on the weight of the report, it was a matter that warranted reopening the decision and embarking on a reconsideration.

But I think the influence of the Ombudsman and the respect owed to his decisions need to be given effect to in the weight a panel gives to that report in addressing a decision that remains the tribunal panel's decision; that is, whether to reopen the case or not.

Mr Philip: I wonder if both of you can walk me through this, because it is complicated and we are dealing with two acts.

Mr Ellis: We both appreciate how complicated it is. It has taken us three or four years to really understand it ourselves.

Mr Philip: Let me try to understand it in layman's language and not in legalese, because I am not a lawyer. Under section 22 the Ombudsman has some fairly broad criteria in which to look at the merits of a case. What I understand the Ombudsman is saying is that, having done so, and having turned out a report that would no doubt detail the various reasons--unreasonable, unjust, oppressive, improperly discriminatory, etc, based on misinformation, missing information or an error in law or whatever--the Ombudsman would then ask the tribunal, without direction or without specific criteria, to review. Notwithstanding that, if you accepted that, needless to say, having read the Ombudsman's report, you would decide which, if any, of the various parts of the information in the report might be used as criteria for review.

Mr Ellis: On the reopening decision.

Mr Philip: If the decision were to reopen.

Mr Ellis: Yes.

Mr Philip: Okay. Under section 76 of your act, you are arguing that you have a discretionary power, that the key word is "may," that this discretion lies with you and that what the Ombudsman is saying is that because of the Office of the Ombudsman, because of the extensive investigation that it would have conducted, the "may" should perhaps be "shall" in that case.

Mr Ellis: In that case.

Mr Philip: Okay. Under section 79 of your act, again you can determine your own practices, but you are saying that as a result of a court case, which none of us has had an opportunity to read, in so doing all parties affected would have to have an opportunity on the decision to reconsider.

Mr Ellis: "To reopen," I think is useful terminology.

Mr Philip: All right, to reopen, to make submissions. I guess where I get confused is that if I were on one side or the other, how would I make my presentation to reopen or not to reopen without using all the criteria that were used under section 22 of the Ombudsman Act to make the original report?

I guess the whole thing becomes kind of academic. The very fact that you would call both parties before you to deal with whether or not it would be reopened would surely open up the case automatically, because the only information I could address myself to, regardless of which side I was on, would be the information contained in the Ombudsman's report, based on section

22 of the Ombudsman Act, which would be, "Yes, this does require a reopening because it was unreasonable, unjust, oppressive, improperly discriminatory, blah, blah, blah," all those criteria.

I really wonder what the end result is other than a kind of academic legal exercise, because the end result surely is that the presentation to reopen is in fact a reopening because the only written criteria on which you can judge whether it should be reopened or not that would be available would be the Ombudsman's report based on section 22 anyway. So your decision to reopen or not reopen is in fact a reopening. Being a layman, I just feel that somehow I may be back with Thomas Aquinas, and a few of the lesser minds other than Thomas Aquinas who were splitting hairs.

Mrs E. J. Smith: Thomas Aquinas was splitting hairs too.

Mr Philip: I am glad that a certain philosopher from the University of Ottawa is not on the committee today or he would argue with that.

Mr Ellis: Can I respond? There is no doubt that in most cases the arguments and submissions on the first question, whether to reopen, will be quite similar to the arguments and submissions that would be made on the second question once it is reopened, but what is important from the adjudicator's point of view, from the panel's point of view, is that the question is quite different. The question the tribunal is required to answer is quite different in the two cases. If we do not maintain the distinction between those two questions, then we end up having to reopen whenever anybody asks us to do so. We would lose all the advantages of a final decision.

In fact, the cases in which we invite parties to make submissions on the reopening are relatively rare because we have a procedure dealing with reconsiderations, and we get a large number of them as you might expect. It is to look and see whether against the criteria that have been established relative to the first question, in cases that have dealt with that first question, a request for reconsideration makes any sense at all.

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Let's say a worker asks for a reconsideration. We send it to the panel initially with instructions to consider whether there is sufficient substance relative to our established criteria for reopening, whether there is sufficient substance in the request for reconsideration to warrant our addressing the first question in a quasi-judicial manner. If there is not, then that application for reconsideration is rejected without troubling the employer to gear up to make submissions about it.

It is only when you have a case in which the application for reconsideration seems to be making some substantial sense that we then go to the obligations outlined by the Divisional Court and write to the employer, in the worker's case, and say: "We have now had a request for reconsideration. We enclose a copy. We invite you to make submissions on the issue as to whether or not we should reopen this and embark on a reconsideration." The bulk of those will be dealt with on the basis of written submissions. It is a rare case when you actually convene a hearing. In a hearing, the kind of confusion about submissions that you refer to is likely to occur.

Mr Philip: Let me submit to you that section 76 was probably put into your act as a way of your being able to discriminate, if you want, between frivolous or unsupported requests for reconsideration and substantive

requests for reconsideration. It would seem to me that when the Ombudsman makes a request for reconsideration, by the very nature of the Ombudsman's office, it cannot be considered in the same light as anyone else making a consideration.

Mr Ellis: We could not appropriately reject it as a frivolous application. That is certainly true.

Mr Philip: Let me submit to you that surely under section 79 of your act you have considerable discrimination and that you could in fact say or decide, if you wished, that by the very nature of the Ombudsman's office, the very nature of the extensive investigation and the very tough criteria by which decisions are made under its act, any decision or request for reconsideration would, by its nature and by its practice, have to be substantive and therefore different from and judged differently from other requests that may have to meet your particular criteria, which probably are quite similar to what the Ombudsman uses under section 22.

Mr Ellis: As I say, the weight of the Ombudsman's report will always be substantial on addressing the question whether or not we should reopen, but what is involved in your submission, with respect, is that the effect of the Ombudsman's recommendation is to preclude the worker's or employer's right to have notice of the reopening and to address the issue of whether or not it should be reopened.

Can the Ombudsman, in making a report, override our obligation and the parties' rights to have a process that complies with the principles of natural justice and so on around that very important question as to whether you are going to disturb benefits that have been established in a final way.

In our view, as I say, the law would not permit that, although the Divisional Court might take a different view. It obviously has not dealt with the impact of the Ombudsman's decision on those rights. From a substantive point of view as well, to accept that is to surrender the judgement in deciding the criteria for reopening to the Ombudsman, away from the tripartite tribunal panel. As I say, we think we do not have the right to do that. We think from a policy perspective, it is not appropriate that be done.

Mr Philip: I wonder if we could have--

The Chairman: Mr Philip, Ms Keil has a response.

Mr Philip: I will just finish off by asking if we could have the Ombudsman's response or comments on my questions.

The Chairman: Perfect.

Ms Keil: Actually, I wanted to agree with Mr Ellis while disagreeing with him, so I may be splitting some of my own hairs. We agree absolutely and unequivocally that a reconsideration should not take place without interested parties having a right to participate. I agree that would be against natural justice. Subsection 19(3) of our Ombudsman Act mandates that anyone who might be adversely affected receive an opportunity to respond. If at the 19(3) stage we were of the tentative opinion that there should be a reconsideration, the employer, if that were the person adversely affected, would receive a complete and detailed letter of the facts and thinking on the subject, and if an

employer had come to us in the first place and the worker stood to lose, the worker would get an opportunity to make submissions.

Those submissions are always included in our final report, so the submissions from the parties are then part of the report that would go to the tribunal. Now, I am not going to say that the Ombudsman automatically accepts submissions from the employer or the worker as to changing the Ombudsman's mind, but they are there and they are considered. Thus, with respect, I do not think the court decision Mr Ellis has cited is really on point for the process the Ombudsman undergoes.

The second point, if I might make it, in relation to your question, Mr Philip, is that we agree there should be criteria. We think it is in fact noteworthy and estimable that the tribunal has set out the criteria very carefully and in a deliberate fashion and that is why we address our report to those criteria.

The one thing I would say in reference to the decision the tribunal produced vis-à-vis our office is that Mr Ellis has said we would be given great weight, but in fact the decision by the tribunal puts us to as rigorous if not a more rigorous standard than is actually set out in its own practice directive.

The decision says on page 7, "The act also requires the tribunal to give parties a full opportunity for a hearing before making a decision."

Mr Philip: Where are you reading from?

Ms Keil: I am sorry. It is page 7 of decision 95R.

Mr Philip: Okay.

Interjection: Read it again.

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Ms Keil: "The act also requires the tribunal to give parties a full opportunity for a hearing before making a decision." I take it they mean that to apply to a reconsideration hearing as well. Their practice directive on this very issue says that "the reconsideration panel may decide whether or not to have a hearing."

I am sorry. I am going backwards a little bit. The practice directive on the question of reopening says: "The panel may decide the matter on the basis of the written request. The panel may also, in its discretion, request submissions from the parties of record." I may misunderstand their practice directive, and if I do, I am sure Mr Ellis will correct me, but I read this to say that the practice directive says the panel does not have to request those very submissions Mr Ellis says it does have to.

Our subsection 19(3) process does request those submissions and it does consider them in the light of the criteria established by the tribunal for reopening and rehearing a case. In that respect, I put it to you that the tribunal's concern that those considerations are not met and in fact not considered is not an accurate reflection of our process.

The Chairman: Are you going to clarify the difference?

Mr Ellis: The reference in the practice directive to the fact that we may or may not request submissions refers to the fact that we will not invite submissions unless we think there is some substance to the case for reopening, but we would never reopen a decision without giving the parties the opportunity to tell us why they think that was a bad thing to do.

Mr McLean: Could I have a clarification?

Mr Ellis: Yes.

Mr McLean: Did Mr T request the Ombudsman to appeal the tribunal's decision?

Mr Ellis: As I understood it, he complained to the Ombudsman about our decision, ie, that it was wrong, and the Ombudsman investigated. The worker appealed the decision—I think it was a worker appeal in the first instance—and was successful in part and unsuccessful in part. He complained about the unsuccessful part. It was that which we were asked to reopen and reconsider.

I should say that it just occurred to me that there is another piece of the substantial concerns that we have not mentioned; that is, when it is reopened and we embark on a reconsideration, there is no guarantee that benefits that the person who has asked for it to be reopened has won in the case may not be in jeopardy in the reconsideration. In other words, it is not necessarily a one-sided reconsideration of only the complainant's point of view. When the worker gets a reopening, it is possible—probably not probable but possible—that there is a downside risk to that exercise and he might end up with less than he had originally.

Mrs E. J. Smith: I am trying to get a few things clarified in my mind. Perhaps I can ask a couple of simple questions for simple answers, because my main question relates in a sense to a new situation that we have here where the employer is not the government.

Mr Ellis: Yes, that is true. There are two parties here.

Mrs E. J. Smith: Yes. That is the end question I have, but before working back to that, you talked about disturbing benefits already in place. This assumes in that case that the complaints were the employer's, because the benefits would be to the employee.

Mr Ellis: Generally speaking, that would be true.

Mrs E. J. Smith: In that actual case, if that actually happened, since they have been awarded, would the benefits not continue until the case ended?

Mr Ellis: Yes, I think that would be true.

Mrs E. J. Smith: So they really would not be disturbed.

Mr Ellis: No, but they would be put at risk.

Mrs E. J. Smith: They would be put at risk rather than disturbed. I just wanted to clarify that in my own mind.

The point was made by Mr Philip, which I agree with: I assume the level of frivolity would never come up once there was a complaint from the Ombudsman.

Mr Ellis: No, I am sure of that. It goes without saying.

Mrs E. J. Smith: Pardon me; I am having to read my own notes as I go. The case that you quoted and dealt with here, would that not more have been a ruling on how that particular case was dealt with, namely, that the employer was not allowed to present at the reopening time, rather than on the general philosophy?

Mr Ellis: It was a ruling that the board could not reopen its decision—

Mrs E. J. Smith: Without hearing from the employer.

Mr Ellis: Without hearing from the employer, or without hearing, in that case, from the defendant.

Mrs E. J. Smith: So that is part of this third party thing, that really the third party involved had to have a right to be heard at that point.

Mr Ellis: Yes.

Mrs E. J. Smith: So that is more procedural, basic to the issue of do we have reconsideration or do we not. It is more how that was handled. Having ruled that way, you would always hear from the employer.

Mr Ellis: Our reading of the decision is that if we were to contemplate reopening, we would first have to hear from the employer—

Mrs E. J. Smith: That is more procedural than substance.

Mr Ellis: It is only as procedural as any principle of natural justice, though.

Mrs E. J. Smith: Okay. One other information thing before I get to my major question: You referred to panels, so I presume the tribunal has more than one panel.

Mr Ellis: Yes.

Mrs E. J. Smith: Is there any protection so that the reconsideration consideration would go to a different panel than the original panel that heard it?

Mr Ellis: Yes, it might well.

Mrs E. J. Smith: It might well or it would?

Mr Ellis: It could go either way depending on the nature of the issue. The usual rule is that it would go back to the original panel.

Mrs E. J. Smith: Maybe that is something we could be looking at. Surely if we are questioning a major decision, if there are two panels, it would make more sense to go to another panel for the reconsideration; that might be a safeguard we have not looked at. That is all I am saying here.

Mr Ellis: It is another issue.

Mrs E. J. Smith: Then I get to a really fundamental problem I have. It seems to me that the Ombudsman, from my background knowledge of it, always considers complaints where the government was the employer. In a sense, if you wanted to look at it that way, we members on this committee are the ultimate group of the employer, because we can so instruct our employees, namely, the people who were the employer of that person, to do what we tell them. So we had a power there that we are not superseding, simply because we are the employer.

Mr Ellis: Yes.

Mrs E. J. Smith: Then suddenly now we have a situation legally where the Ombudsman is getting into cases where we are not the employer and therefore we as the panel are telling some third party he has to do something, whereas before we were only telling our own employees that they had to do something, namely, the government; or we were recommending to the Legislature and the Legislature then has the power to do.

But there is a third party here. I wonder, in moving the Ombudsman committee into this role of dealing outside of its own employees, how we have worked at protecting the employer, because that is what keeps coming up in minor ways here. I am assuming that 99 times out of 100--and I do not know if it has ever been the 100--the cases that will come into appeal in this way will be employee cases rather than employer cases. I do not know how true that is, but I think it falls out of the old nature of the Ombudsman, that we were the employer and therefore we could look and see whether we thought our employee had treated his employee fairly. I am concerned about that third party and how they were introduced.

Mr Philip: We ended up doing that with the Labour Relations Act.

Mrs E. J. Smith: I do not know other precedents and this is why I was asking, really from the legal people, what other precedents there are and what protection there is in that regard.

Ms Evans: What I would say is that what this committee does is direct its governmental organization, in this case the Workers Compensation Appeals Tribunal, to do something. It is not making a decision directly that would affect the employer, or the employee in that case.

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However, in the past, this committee has also dealt with many, many, many Workers' Compensation Board decisions in which it has made a very specific recommendation which would have a direct impact upon a third party. It is not at all unusual.

Essentially, what this committee does is direct the governmental organization to act in a certain way. That action may well have an effect upon a third party, but that is what we are doing.

Mr Bell: At the risk of tag-teaming it: The dynamics have changed, you are right. I am not sure what the change is, because this case is the first time I understood or knew that the Ombudsman hereafter will only recommend, where appropriate, one type of recommendation, ie, "Please reconsider," whereas before, as we said earlier, it covered the spectrum.

Therefore, in the future, it seems this committee's involvement with WCAT cases---

Mrs E. J. Smith: What is that?

Mr Bell: Workers' Compensation Appeals Tribunal.

---will be limited to a consideration of whether a refusal to reconsider by the tribunal is adequate or appropriate. That, to me, is going to significantly narrow the scope of what this committee has done with WCB matters, compared to the past.

So there is a change. I do not understand, myself, enough about the dynamics of the new act, etc, to usefully assist you on the employee-employer relationship. To my mind, I do not think that relationship has changed, because the focus is to the tribunal and not to the parties who are affected by the tribunal's decision. If anything, it is less, because the level of discussion will be almost limited to the tribunal level and not to the particular merits of the case, although you cannot avoid getting into the merits, for obvious reasons, but I think to a much lesser degree than before.

The Chairman: Martha, you had a comment too?

Ms Keil: I was just going to say that you are right. We do get more complaints from workers than employers but we also get complaints from employers. As a matter of fact, the very last case that we had with the Workers' Compensation Board, which was mine, was an employer complaint and it was supported. Of course, it was against another employer. There was no disenfranchised worker.

Mr Carrothers: I am still not quite clear on the nature of this two-step process. I am wondering, Mr Ellis, if you could take me back through it step by step in detail and indicate who is present at each of the two stages, or perhaps primarily the first stage, what arguments are made if any, how they are done: in person or are they done on paper? Again, if you could describe the issue that is being decided, what question the board is putting to itself. It is not quite clear in my mind how that works. I am just trying to picture it. I have not had experience with it.

Mr Ellis: The appeals tribunal deals with appeals from the WCB's decisions. We are the final stage in the appeal process. Our decisions are characterized by the statute as intended to be final and binding. That is, however, subject to the provision in section 76 of the act, which applies to us as well as to the board which reads: "The board may, at any time if it considers it advisable to do so, reconsider any decision, order, declaration or ruling made by it and vary, amend or revoke such decision, order, declaration or ruling."

We receive in the ordinary course, almost routinely, requests for reconsideration once we have issued a final decision. That final decision, by the way, is made after a full hearing. The parties have notice of all of the evidence. They come, they make submissions. It is made by a tripartite panel, with a worker member, employer member and a neutral panel chair. The decision is written and reasons are given and so on.

Having gone through all of that process, and having regard to the instructions about the decision being final, and we think the good policy considerations for that decision, having come this far, to be finally final,

we look then at the provision in section 76 about reconsiderations. We note that whether or not to reopen and embark on a reconsideration is a matter that is within the tribunal's discretion. We do it if we consider it advisable to do so.

We also note the Divisional Court provision that if we are going to exercise that discretion in favour of reopening a decision, we should not do that before we give the party that will be affected by that reopening an opportunity to tell us why it is not a good idea.

Mr Carrothers: When you say "the party," is it both? There is the employer, who ultimately is bearing the cost, and then there is the employee. Are they both advised or is it the one who requested it?

Mr Ellis: Normally, we will issue the final decision. Let's say it goes in favour of the worker. Take the more typical case: Say it goes against the worker. The worker will then write to the Ombudsman. The worker may write to us. Most often, the worker writes to us and says, "This is a bad decision for the following reasons and I want you to reconsider it." The language is not always exactly polite or technical but that is the substance of it.

At that stage, I refer that letter to a panel; it is almost always, at this stage, the original panel that made the decision in the first place. I refer that letter to that panel and I say to it, "Would you look at this and tell me whether there is any substance to the request for reconsideration, having regard for our criteria as to when we will exercise this discretion?"

If there is some substance, if the worker's complaint is making some sense, as judged against those criteria, then the panel will say so and the panel will then give notice, at that point, to the employer and say: "We have been asked to reconsider this final decision. Here is the letter we have received. The panel thinks there is an issue of some substance and we invite your submissions on the question of whether or not there the request has met the criteria for reopening the decision."

Mr Carrothers: That notice goes to the employee.

Mr Ellis: The employer.

Mrs E. J. Smith: The defendant.

Mr Carrothers: The defendant, to use those terms.

Mr Ellis: The respondent in the appeal. Of course, a copy of our letter to the employer will also go to the worker.

Then we will normally get written submissions from the employer on that point. If the panel then concludes that this is a case where the criteria have been met, and the panel then decides that the tribunal should reopen this decision and embark on a reconsideration, at that point the chairman of the tribunal, who has the power to establish panels, may instruct that same panel to go ahead and deal with the reconsideration, or I may decide it is an appropriate case to select another panel to hear it again and reconsider it.

In either case, that will be done with a full hearing, the employer and the worker will be given full notice that is happening, and there will be a rehearing of the case.

The panel that directs the reopening may decide that it should confine the reopening to some part of the case, so it is not always the whole thing that gets reopened, but it could be. In any event, the panel that is assigned the duty of reconsidering hears all the evidence, hears the arguments again, probably looks at the transcript of the previous hearing, and that panel can then either confirm that it thinks the original decision was right or amend or vary it as it thinks right. At that point we would issue a new decision, and no doubt we would then get the employer asking us to reconsider that new decision. There are lots of reasons for wanting a finality at some point.

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Mr Carrothers: Just to restate it, to see if I have understood this correctly, you get the letter and it could say any number of things; it could give reasons or anything. You give that back to the panel and the panel then obviously makes a decision that it is worthy of looking at. It almost seems to make two decisions.

Mr Ellis: Yes.

Mr Carrothers: It will decide that it is going to get comment from the employer. Is that right?

Mr Ellis: Yes, that is basically right.

Mr Carrothers: Then having received the comment from the employer, it will then decide whether to reconsider.

Mr Ellis: Yes, whether to reopen. The word "reconsider" is kind of a word that eludes you as you go along. I think "reopening" is better.

Mr Carrothers: Reopening, and then you basically have a new trial or a new hearing.

Mr Ellis: Yes, and that is the process of reconsideration which may lead to the same decision or not.

Mr Carrothers: Putting an Ombudsman's letter or recommendation here, obviously what you are saying happens is that first step of whether to consider to get comments from the employer would almost never take place. You would automatically virtually——

Mr Ellis: No, the Ombudsman thinks we should automatically go to the employer for comment. Okay, you are right. No, we would——

Mr Carrothers: Within this first stage there is a two-decision thing.

Mr Ellis: Yes.

Mr Carrothers: I am assuming that some letters are almost automatically put aside without any further effort. You just say: "Really, there's nothing here. We're not going to do anything."

Mr Ellis: Yes, that is true.

Mr Carrothers: Then for another group of them, a much smaller group presumably, you will say: "There seems to be something here"——using those legal terms, prima facie case, whatever you want——"We're going to ask for the employer to comment."

Mr Ellis: Yes, and we would always do the second with respect to an Ombudsman's report.

Mr Carrothers: I am assuming that an Ombudsman virtually always gets to that stage.

Mr Ellis: Yes.

Mr Carrothers: So that when you say somewhere in here that it is treated like a letter from the worker, it is because it goes through this process but in a way it is not because you say it is given greater weight.

Mr Ellis: Yes.

Mr Carrothers: I am wondering whether maybe the Ombudsman's--

Mr Ellis: It is treated the same way as a weighty worker's letter, if I can put it in those terms.

Mr Carrothers: The procedure is the same. What you are suggesting, and you have given us the Divisional Court decision here, is that by virtue of the wording of section 76 and by virtue of the reasoning in that Divisional Court case, you really have to go through this process. You are quasi-judicial, you have to go through those steps, you cannot surrender those or you cannot avoid going through them, even though they are going to be almost peremptory.

Mr Ellis: That is our view, yes.

Mr Carrothers: I wonder if I could ask the Ombudsman, given that obviously your reports are going to be given great weight here and given the wording and given, I guess, the position being taken by WCAT that it is basically bound to do certain things by the legislation, can you distinguish them? Perhaps you could give me again your arguments why you think they should automatically go to a reconsideration and avoid this first step?

Ms Keil: Mr Ellis has talked about important policy considerations from the tribunal's point of view, and I think that is fair. But I also think it is fair to say that we considered those. I would like to talk now about his policy considerations. I would like to talk now about what I think are the really fundamental policy considerations for our office in reference to your question.

Mr Carrothers: All right.

Ms Keil: Just to put it really simply, if the tribunal believes that it has to duplicate what we have done in order to ensure that its policy considerations are taking place, it makes superfluous what we have done.

Mr Carrothers: How?

Ms Keil: In other words and specifically, if we write to the employer and say, "This is the case, this may be reopened, and if our recommendation is accepted you will be adversely affected, please make submissions," and the employer makes submissions on the very same facts and they are then incorporated into the final report and then the tribunal gets that and writes to the employer and says, "You may be adversely affected, please give us your opinion," the employer is going to give much the same, one

would think, reasons for not opening it. It is not clear to me, even within the strictures of natural justice, how many opportunities one needs to have to respond.

Mr Carrothers: Well—

Ms Keil: If I can just say, because this is the process the tribunal has followed in our second case, the worker who complained to our office and in whose case we made a recommendation for reconsideration was sent a letter saying: "We're thinking about reopening. Do you have any submissions?" He called us up and said: "Are they trying to confuse us? I thought that's what you guys told them to do. Why are they writing to me again to ask the same thing?" Our concern is this redundancy.

Mr Carrothers: That may be, although it just seems to me that, by essence, your office is duplicating. That happens in almost everything you do because you are almost relooking at what has happened somewhere. But, to restate my question, given the present wording of section 76—because I think your arguments may go to something quite different that is beyond the power of WCAT—and given the reasoning of that Divisional Court case, which at least we have had summarized here, how could WCAT act any differently? You may be arguing the Legislature should make some change to the legislation here, because I cannot see how they could do any differently than they are doing.

Ms Keil: I think when you look at the phrase "considers it advisable," however someone considers it advisable is a decision to—okay, I am not—

Mr Carrothers: But they have to take the decision. That is the point that seems to be coming out of this. They have to make the decision here. They cannot surrender that decision power, unless the act is changed. I am not saying that you are not making sense and that there is not duplication, and that it may be unreasonable to have it. What I am saying is, as the whole thing is presently set up, how would WCAT act differently?

Ms Keil: I think what we are saying is that the tribunal members could read an Ombudsman's report and think about it as they were reading it—I am sorry, I assume they do that—and apply it to the criteria for reopening that they know they have. At the end of the report they can say, "It is advisable on the basis of this to reopen."

Mr Carrothers: How would you respond then, just going on this Divisional Court case—and maybe you want to have a chance to look at it and respond later—but say they do that and then an employer brings an application saying: "Wait a minute. This whole process WCAT took was wrong because I should have had a chance to comment first based on its other decisions."

Would that not likely succeed and would it not be better, even if it is peremptory—because I see this as being very peremptory—any indication I have had here is that the Ombudsman's report is virtually always going to be acted upon. But they have to go through the process the way the present thing is structured, or their whole decision could be overturned by the Divisional Court, by its process.

Ms Keil: If I understand the court ruling on that other case, what it said was that it was wrong of the appeal board to reconsider and to hold a new hearing without giving any notification that this would happen. In other words, it took the employer—it came out of the blue, as it were. In any of our cases that is not possible. It is not a finding of fact.

Mr Carrothers: No, but I think though—and again, maybe we want to look—is not the nub of the Divisional Court, as I have understood it here, that the board did not itself give an opportunity?

Ms Keil: I think this is such a different fact situation that—

Mr Carrothers: We are splitting hairs but we have to, and I guess to come back to the point, as the present thing is set up how could the WCAT do it any differently?

Ms Keil: There are two things and I do not want to speculate on what a court would do because I do not know.

Mr Carrothers: Maybe the Ombudsman could, at some later date, provide us with some thoughts in answer to this question. It would be very helpful to me. Maybe at this point, you are not prepared or cannot.

Ms Keil: No, I am sorry, what I wanted to say was that ruling was not for WCAT. It was for the Workers' Compensation Board—

Mr Carrothers: But it said—

Ms Keil: —and it was where there was no opportunity to make representations. What I am saying is that is not the same case here, so it is a different kind of situation.

Mr Carrothers: No, because they have had it from you, but not before the board. It is a splitting of hairs, I recognize, but it is the kind of thing these things do get hung up on and the kind of thing on which procedures are overturned and things do get reheard.

Maybe we would want to give some comment back because it may be that the committee's decision may not be to suggest WCAT change its procedures, but that we really have to look at how the whole act is worded. I just do not understand how WCAT could do any differently under the present wording.

The Chairman: Would you like a little bit of time? It seems we are not going to finish this. I have a few people on my list. Would it be preferable to the Ombudsman's office for us to recess for lunch and give you some time to collect your thoughts on this question? I do have Tony, Ed and Joan still wanting questions, so I do not see any way that we would finish.

Mrs E. J. Smith: Actually, Madam Chairman, I was going to suggest we recess so everyone could have time.

The Chairman: I think that might give you an opportunity. We will reconvene at two o'clock. Thank you.

The committee recessed at 1201.